

(25,480)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 650.

HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE  
SHIP "APPAM," AND L. M. VON SCHILLING, VICE-  
CONSUL OF THE GERMAN EMPIRE, APPELLANTS,

vs.

BRITISH & AFRICAN STEAM NAVIGATION COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF VIRGINIA.

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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,  
*Eastern District of Virginia, ss:*

At a District Court of the United States for the Eastern District of Virginia begun and held at the United States court room in the Court House and Post Office Building in the City of Norfolk, Virginia, on the first Monday in the month of May, being the first day of the same month, in the year of our Lord one thousand nine hundred and sixteen.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

No. 2084. In Admiralty.

BRITISH & AFRICAN STEAM NAVIGATION COMPANY, LIMITED, Libellant,  
against  
STEAMSHIP "APPAM," etc., Respondent.

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*Libel.*

Filed February 16th, 1916.

To the Honorable Edmund Waddill, Jr., judge of the court aforesaid:

The libel and complaint of the British & African Steam Navigation Company, Limited, against the Steamship Appam and against any and all person or persons in possession thereof or lawfully intervening for their interests in said steamer, in a cause of possession, civil, tort and maritime, alleges as follows:

First. The libellant is a corporation duly organized and existing under the laws of the Kingdom of Great Britain and Ireland, and is, and was, at the times hereinafter mentioned the true and lawful owner absolutely of the steamer Appam, now lying at Newport News and at all times hereinafter mentioned had possession and use of said vessel as such owner, except as hereinafter mentioned.

Second. Said Steamship is wrongfully withheld from the libellant by one Hans Berg and other persons unknown to the libellant.

Third. The Steamship Appam sailed from Dakar, Africa, on January 11th, 1916, for Liverpool. On or about the 16th day of January, 1916, she was unlawfully seized by certain persons unknown to the libellant, and thereafter, under compulsion, she was

3 forced to proceed with her passengers, crew and cargo to Hampton Roads, and arrived at Hampton Roads on the 1st day of February, 1916; that thereafter she was removed to the port of Newport News, where she is now lying.

Fourth. All and singular the premises are true and within the jurisdiction of this Honorable Court.

Wherefore the libellant prays that process in due form of law, according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said Steamship Appam, her tackle, apparel and furniture, engines, boilers, machinery and appurtenances, and that the said Hans Berg and all other persons having, or pretending to have, any right, title, or interest in said steamship may be cited to appear before this Honorable Court, and show cause why possession of the said steamship shall not be delivered to the libellant, and that this Honorable Court will be pleased to decree that the possession of the said steamship be delivered to the libellant, and to administer such other and further relief in the premises as in law and justice it may be entitled to receive.

BRITISH & AFRICAN STEAM NAVIGATION COMPANY, LIMITED,  
By W. A. HOWARD, *Agent*.

FREDERICK R. COUDERT,  
RALPH JAMES M. BULLOWA,  
HUGHES & VANDEVENTER,  
*Proctors.*

Subscribed and sworn to before me by the said W. A. Howard this 16th day of February, 1916.

D. ARTHUR KELSEY, *D. Ct'k.*

4 *Claim, Plea and Answer to Libel.*

Filed March 3rd, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the Court aforesaid:

The claim, plea and answer of Hans Berg, Master in charge of the prize ship "Appam," and L. M. von Schilling, Vice-Consul of the German Empire for the district comprising Newport News, Norfolk and Portsmouth and all waters contiguous thereto, hereby claim the said "Appam" and aver that she is the property of the said German Empire and no other person is the owner thereof; and they further severally aver that they are duly authorized hereto by said

5 owner, and that the said Hans Berg is the Master of the said prize ship "Appam" and bailee thereof for the said owner.

And answering the said libel they aver as follows:

First. They have no knowledge whether the libellant is a cor-

poration duly organized and existing under the laws of the Government of Great Britain and Ireland, but they deny that said libellant is or was at any time mentioned in said libel the true and lawful owner of the said steamer "Appam," or that at all times mentioned in said libel they had possession and use of said vessel as such owner, and they deny any knowledge whether libellant at any time was the owner of said vessel, and call for strict proof thereof if material.

Second. They deny the statements contained in the second article of said libel.

Third. These respondents have no knowledge when nor from whence said steamer sailed, and therefore neither admit nor deny the same but call for strict proof thereof. They deny that on 6 or about the 16th day of January, 1916, or at any time thereafter she was unlawfully seized by certain persons unknown to the libellant, though they admit that she was brought into Hampton Roads under the circumstances hereafter described, and that she is now at the port of Newport News, Virginia.

Fourth. They deny the fourth allegation of said libel.

And further answering these respondents state that the said steamer "Appam" while a British vessel was captured on the high seas on January 15th, 1916, during the existence of a state of war between Great Britain and the German Empire, by the Möwe, a man-of-war of the German Empire, and became a lawful prize of war of said Empire, and was placed by the commander of said captor vessel in charge of Hans Berg, a lieutenant in the naval forces of said German Empire, and a prize crew composed of men in the naval service of said Empire, and was brought into the port of 7 Newport News, Virginia, and is now held by the said Hans Berg and his said prize crew as a lawful prize of war belonging to and the property of the said German Empire.

And these respondents further aver that by the Law of Nations the title of said German Empire to the said prize can not be inquired into in these proceedings, and that by the treaties now in force between the said German Empire and the United States of America, and also by the said law of Nations, the said prize was entitled to enter the harbor of Newport News and is exempt from any legal process of arrest, search, or otherwise, in the premises, and on behalf of and by authority of said German Empire they respectfully protest against any action of this court and pray that the said libel be dismissed.

(Signed)

HANS BERG,

*Master in Charge, etc.*

(Signed)

L. M. VON SCHILLING,

*Imperial German Vice Consul.*

JOHN W. CLIFTON,  
HUGHES, LITTLE & SEAWELL,  
NORVIN R. LINDHEIM,  
W. S. PENFIELD,  
*Proctors for Respondent.*

## STATE OF VIRGINIA,

*Corporation of the City of Norfolk, To-wit:*

Now this day personally appeared before me Hans Berg, who duly signed and made affidavit to the truth of the matters and things above contained.

(Signed)

MINNIE C. COPELAND,  
*Notary Public.*

## STATE OF VIRGINIA,

*Corporation of the City of Norfolk, To-wit:*

Now this day personally appeared before me L. M. von Schilling, who duly signed and made affidavit to the truth of the matters and things above contained.

(Signed)

MINNIE C. COPELAND,  
*Notary Public.*

*Amended Libel.*

Filed March 7th, 1916.

To the Honorable Edmund Waddill, Jr., judge of the court aforesaid:

The Libellant, pursuant to the rules of this court, by way of amendment to the libel heretofore filed in this cause, so as to confess and avoid, or explain or add to the new matters set forth in the answer filed in this cause by Hans Berg, Master, etc., and L. M. Von Schilling, Vice Consul, etc., alleges upon information and belief as follows:

1. That the German Naval Prize Code, in effect since 1909, provides as follows:

111. The commander provides for bringing the vessel into a German port or the port of an ally with all possible dispatch and safety.

A prize may be brought into a neutral port only if the neutral power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel or supplies. In the latter cases she must leave as soon as the cause justifying her entrance ceases to exist.

2. That the Steamship "Appam" arrived at Hampton Roads on the 1st day of February, 1916, in a seaworthy condition. That since that time she has been removed to the port of Newport News, where she is now lying at anchor in the custody of this court; that according to the law of Nations and the laws of the United States the claimants have not been and are not entitled to hold and detain the said Steamship at Newport News; and that by holding and detaining the said Steamship at Newport News until the serving of the process in this cause, claimants have violated the Law of Nations and the laws of the United States, and the neutrality of the United States; and that according to the Law of Nations and the laws of the United



10 States the libellant is entitled to the possession of the said Steamship.

3. This libellant further alleges upon information and belief that prior to the arrival of the said Steamship at Hampton Roads and in the port of Newport News, and since the said arrival, the claimants, or persons unknown to the libellant, have removed portions of the cargo of said Steamship, in violation of the Law of Nations and the laws of the United States, and in violation of the neutrality of the United States:

Wherefore, the Libellant prays as in the original libel heretofore filed in this cause.

BRITISH & AFRICAN STEAM NAVIGATION COMPANY, LTD.,  
By DANIEL BACON, *Agent*.

FREDERICK R. COUDERT,  
RALPH JAMES M. BULLOWA,  
HUGHES & VANDERVENTER,  
*Proctors.*

Subscribed and sworn to before me this 7th. day of May, 1916.

R. E. POWERS,  
*Deputy Clerk U. S. District Court:*

11 *Order Granting Leave to File Amended Libel.*

Entered and Filed March 7th, 1916.

On motion of the libellant, by *their* proctors, leave is granted the libellant to file its amended libel and the same is accordingly filed, and 13 days are allowed the claimants to file their answer thereto, if they be so advised.

EDMUND WADDILL, JR.,  
*U. S. District Judge.*

March 7th, 1916.

12 *Suggestion of the United States Attorney.*

Filed March 7th, 1916.

I, Richard H. Mann, United States attorney for the Eastern district of Virginia, acting under the direction of the attorney-general, hereby suggest to the court that the United States of America, through the department of state, has received the following communication from the German ambassador:

Germany Embassy, Washintgon, D. C.  
J. Nr. A. 1293.

WASHINGTON, D. C., February 22, 1916.

MY DEAR MR. SECRETARY: Lieutenant Hans Berg, of the German imperial navy and commander of H. M. S. "Appam", now lying



at anchor near Newport News, Va., has informed me that a libel was filed against said vessel in the United States district court for the Eastern district of Virginia, at Norfolk, on the 16th day of February, 1916, by the British and African Steam Navigation Company, Limited, and that under the authority of said court, he has been cited by the marshal of the Eastern district of Virginia, to appear before said court on Friday the thrid day of March, 1916, to answer the said libel.

As the Appam was captured at sea by a German man of war and brought to the Virginia port as a prize ship according to the treaty existing between our countries, you may well appreciate my surprise at the action which has been taken.

Article XIX. of the treaty of 1799 between Prussia and the United States, renewed in part by Article XII. of the treaty of 1828, provides that "the vessels and effects taken from" the enemies of the contracting parties may be carried freely where-soever they please and that such prizes shall not be "put under legal process, when they come to and enter the ports of the other party—"

In view of the terms of the treaty, I am at a loss to understand why such action has been taken by a court of your country. It may be argued that it has been because of article 21 of the Hague "con-vention concerning the rights and duties of neutral powers in naval war" is applicable. This article provides: "A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions."

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the crew."

But as Great Britain has not ratified the convention, the article is not binding for the reason that article 28 provides: "The provisions of the present convention do not apply except to the contracting powers, and then only if all the belligerents are parties to the convention."

Besides the Appam flies the naval flag of and belongs to the German government and therefore the possession of the captors in a neutral port is the possession of their sovereign. The sovereign whose officers have captured the vessel as a prize of war remains in possession of that vessel and has full power over her. The neutral sovereign or its court can take no cognizance of the question of prize or no prize and cannot wrest from the possession of the captor a prize of war brought into its ports.

The position which I take is fully supported by an opinion of the Attorney-General of the United States (7 Op. 122) the syllabus of which recites that "a foreign ship of war, or any prize of hers in command of a public officer possesses in the ports of the United States the right of extritoriality and is not subject to the local jurisdiction."

I would, therefore, most respectfully protest against the action

of the United States district court and request that you may ask the Attorney-General to instruct the United States District Attorney for the Eastern District of Virginia to appear before the United States District Court and take such steps as may be necessary and proper to secure the prompt dismissal of the libel.

I am, my dear Mr. Lansing,

Very sincerely yours,

(Signed)

J. BERNSTORFF.

In making this suggestion the United States does not intervene as an interested party, and the United States Attorney does not appear either for the United States or for the German government, but presents the suggestion as *amicus curiæ* as a matter of comity between the United States and the German government.

RICHARD H. MANN,

*United States Attorney.*

HIRAM M. SMITH,

*Assistant United States Attorney.*

Richmond, Va., March 7th, 1916.

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*Suggestion of United States Attorney.*

Filed March 20th, 1916.

Richard H. Mann, United States Attorney for the Eastern District of Virginia, acting under the direction of the Attorney General of the United States, hereby suggest to the Court that the German Ambassador has represented to the United States through the Department of State as follows:

"I now assure you that while reserving all the rights of the German Government in this case, both before the court and in our diplomatic negotiations, and with a further reservation that such assurance and agreement shall be without prejudice to the defense, no change shall be made in the status quo with respect to augmentation of the crew or equipment that might be considered a breach of neutrality, and that no attempt to run the vessel (the Appam) away will be made so long as the said ship remains under the custody of said court."

In making this suggestion the United States does not intervene as an interested party, but presents the suggestion as *amicus curiæ*, and as a matter of comity between the United States Government represented by the Department of State and the German Ambassador.

RICHARD H. MANN,

*United States Attorney,*

By HIRAM M. SMITH,

*Ass't U. S. Attorney.*

Norfolk, Va., March 20th, 1916.

16 *Exceptions, Plea, and Answer to Amended Libel.*

Filed March 20th, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the Court aforesaid:

The exceptions, plea and answer of Hans Berg, Prize Master in charge of the prize ship Appam, and L. M. von Schilling, Vice-Consul of the German Empire for the District comprising Newport News, Norfolk and Portsmouth, and all waters contiguous thereto, to the amended libel filed by leave of court in this cause on March 7, 1916. These respondents not waiving their objection to the jurisdiction of this court over the alleged cause of action set out in

17 the original and amended libels, but expressly reserving the same, except to the amended libel on the following grounds:

First. That admitting, for the purpose of this exception only, that the allegations of the said amended libel are true, there are no facts set out which show any violation of the neutrality of the United States.

Second. That even if the said allegations can be considered as showing any violation of such neutrality, it was not such a violation as is a matter for the court and not such as would give any ground for restoring the possession of the said steamer Appam to the libellant herein.

And by way of answer to said libel, without waiving any of the said exceptions, these respondents hereby repeat all of the allegations contained in their answer to the original libel in this cause, and the prayer thereof, and pray that the same may be taken as a part of this answer.

18 And answering specifically the paragraphs of the amended libel these respondents say:

(1.) As to the first paragraph these respondents deny that the German Prize Code is correctly quoted in the amended libel, and call for strict proof thereof, if material.

(2.) It is true that the Steamship Appam arrived at Hampton Roads on the first day of February, 1916. At the time she was not in a seaworthy condition. She was manned by a prize crew of only twenty-two men, and she had on board the crew and passengers of the captured steamer as prisoners, who aggregated about four hundred persons. Of these the crew alone consisted of about one hundred and sixty, she being a very large steamer and requiring a very large crew to handle her. She was short of water, provisions and fuel, and was necessarily obliged to come into a harbor as a matter of necessity and humanity. Her machinery also needed overhauling. It is true that she was afterwards removed to the port of Newport News. It does not appear that according to the Law of Nations and the laws of the United States they have not been and are not entitled to hold and detain the said steamer at Newport News. The prize master brought her into Hampton Roads in good faith, relying upon the treaty between the

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United States of America and the German Empire, which provides as follows:—

"The vessels of war, public and private of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. (But conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger or accident of the sea, they shall be obliged to depart as soon as possible.)"

This is an old treaty and was originally both in French and English. The French form of the same is as follows:—

"Les vaisseaux de guerre publics et particuliers des deux Parties Contractantes pourront conduire en toute liberté, partout où il leur plaira, les vaisseaux et effets qu'ils auront pris sur leurs ennemis, sans être obligés de payer aucuns impôts, charges ou droits aux Officiers de l'Amirauté, des Douanes ou autres. Ces prises ne pourront être non plus ni arrêtées, ni visitées, ni soumises à des procédures légales, en entrant dans le port de l'autre partie, mais elles pourront en sortir librement, et être conduites en tout temps

20 par le vaisseau preneur aux endroits portés par les commissions, dont l'officier Commandant le dit vaisseau sera obligé de faire montre.

(Mais, conformément aux Traités subsistans entre les Etats-Unis et la Grande Bretagne, tout vaisseau qui aura fait une prise sur des sujets de cette dernière Puissance, ne saurait obtenir un droit d'asile dans les portes des Etats-Unis; et s'il est forcé d'y relâcher par des tempêtes ou quelque autre danger, ou accident de mer, il sera obligé d'en repartir le plutôt possible.)"

(The parts in parenthesis lapsed and were not revised by the existing treaty of 1828, and are no longer in force.)

These respondents aver also that by the general principles of international law the prize master was entitled to bring his ship into this neutral port under the circumstances above set forth, and that the length of his stay therein is not a matter for determination in a judicial tribunal of the United States.

Third. These respondents deny the averments of the third article of the amended libel.

Further answering these respondents say proceedings have been instituted in a proper prize court of competent jurisdiction  
21 in Germany for the condemnation of the said steamer Appam and her cargo as prize of war, and that such proceedings are now pending. Said proceedings are being pressed with all the speed possible under the rules of procedure that there prevail, and these respondents respectfully pray this court to suspend all further pro-

ceedings until the said prize proceedings are brought to an end, and proper evidence thereof is laid before this court.

And these respondents repeat also the prayer of their answer to the original libel.

HANS BERG, *Prize-Master*.  
L. M. VON SCHILLING,  
*Vice-Consul of the German Empire, Newport  
News, Norfolk & Portsmouth.*

JNO. W. CLIFTON,  
HUGHES, LITTLE & SEAWELL,  
NORVIN R. LINDHEIM,  
WALTER S. PENFIELD,  
*Proctors for Respondent.*

22      STATE OF VIRGINIA,  
*Corporation of the City of Norfolk, To wit:*

Now this day personally appeared before me Hans Berg, who duly signed and made affidavit to the truth of the matters and things above contained.

[SEAL OF NOTARY.]

MINNIE C. COPELAND,  
*Notary Public.*

STATE OF VIRGINIA,  
*Corporation of the City of Norfolk, To wit:*

Now this day personally appeared before me L. M. von Schilling, who duly signed and made affidavit to the truth of the matters and things above contained.

[SEAL OF NOTARY.]

MINNIE C. COPELAND,  
*Notary Public.*

23      *Order Denying Postponement of Hearing and Setting Cause  
for Trial.*

Entered and Filed March 20th, 1916.

In this cause on March 13th, 1916, in Richmond, the libellant filed, by leave of court, his amended libel and moved that the cause be set down for a speedy hearing, assigning as reasons therefor, among others, the exposed anchorage at Newport News, the number of the prize crew on board of said steamship as compared with the number of the Court's guards, the heavy expense of keeping the vessel in the Court's custody and the heavy loss attending the libellant if adjudged owner of said steamship, by reason of said steamship remaining in the custody of the Court, and the loss and injury to the cargo should it be found necessary when a libel for its possession is filed for it to remain in the custody of the Court until such hearing, to which respondents objected and asked for sufficient time naming at least 60 days, to secure from Germany a copy of the commission of Lieutenant Berg as an officer in the German Navy,



a copy of the papers of the captor steamer Möwe showing her character as a man-of-war of the German Empire, and a copy of the commission of the Commander of the said captor ship Möwe, and urged the difficulty and delay of communicating with the

24 German Government the said papers all being in Germany.

The proctors for libellant objected to said delay and offered to admit in open court that Lieutenant Berg was a duly commissioned officer in the German Navy, that the captor ship was a duly commissioned war ship of the German Navy, and that the Commander of the said steamer Möwe was also a duly commissioned officer of the German Navy.

And thereupon the respondents were given until March 20th, 1916, to file their answer to the amended libel, at which time the court announced that it would definitely settle the date for hearing the case, stating that it was the desire of the court that it should be heard during the week commencing March 27th, 1916, but not definitely setting it for any day of that week.

And now, on March 20th, 1916, the respondents filed their answer to the amended libel, in which answer it was averred that proceedings had been instituted in Germany for the condemnation of the Steamship Appam and her cargo as prize of war; that said proceedings were still pending and being pressed with all speed possible under the rules of procedure that there prevail; and the said answer also prayed that this court would suspend further proceedings until the said prize proceedings were brought to an end and proper evidence thereof laid before this court.

Thereupon the libellants renewed their motion for a speedy trial of the cause, and the respondents, in reply to libellant's motion, also asked the court to postpone for a reasonable time any hearing of the case until they could secure from Germany the above named copies of commissions, at which libellants renewed their offer to admit the same as evidence as above stated.

25 But the court being of opinion from the peculiar circumstances of this case that an early hearing is important, and that it should not wait for such papers,

Hereby adjudges and decrees that the said case be set for hearing on Tuesday, the 18th day of April, A. D. 1916, to which respondents excepted.

EDMUND WADDILL, JR.,  
U. S. Dist. Judge.

Norfolk, Va., March 20th, 1916.

26 *Order Appointing Surveyor.*

Entered and Filed April 8th, 1916.

On motion of the libellant leave is granted J. H. Marsden, as Marine Surveyor representing the Libellant, and such other person as may be named by the defendants, to go upon the Steamship Appam and hold a survey upon her hull, engines, boilers and ma-



chinery to determine the condition thereof; said surveyors, when making such survey, shall be accompanied by the Marshal of this Court, or his deputy, in charge of said ship and such survey shall be made under the supervision of said Marshal, or his deputy, who shall confine the investigation and inspecting of the ship by said surveyors strictly to the purposes and objects of this order, to which action of the Court the respondents objected.

EDMUND WADDILL, JR.,  
U. S. Dist. Judge.

April 8th, 1916.

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*Report of Surveyor.*

Filed May 13th, 1916.

To the Honorable Edmund Waddill, Jr., U. S. District Judge.

Pursuant to your order dated April 8th, 1916, I proceeded on April 14th, 1916, accompanied by the Marshal of the Court to the Steamship "Appam" lying afloat in the James River, off Newport News and held a survey upon her hull, engines, boilers and machinery and submit the following report on the condition thereof;

The hull examined externally afloat and found in good condition. The decks, deck erections, masts, rigging, hatches and deck equipment generally examined and found in good order.

The hold bilges, the double bottom tanks and the peak tanks sounded at intervals and the vessel found tight and making no water.

The holds through the vessel, the machinery spaces and the spaces above peak tanks examined internally and the vessel found in sound and good condition throughout.

In the lower holds the vessel is locally somewhat bare of paint. The double bottom tanks below the holds and the peak tanks are filled with water in order to ballast the vessel.

In the space between the shaft tunnels which forms the lower part of the No. 4 Hold a quantity of wet grain and an accumulation of several inches of water was found.

This water has not leaked through the shell plating of the vessel but is probably due to a defective joint in top doors or air pipes of the ballast tank below this space.

It is recommended that this space be cleaned out and nature of the trouble ascertained and corrected.

28 While the survey of the hull was in progress, at about 5.30 p. m. the vessel dragged anchor in a strong gale and drifted toward the Piers at Newport News.

Steam was therefor turned on the main engines from the forward boiler and for about two hours the port and starboard main engines were worked intermittantly to bring the vessel to safe anchorage.

During this operation the port and starboard main engines and the auxiliary pumps and machinery were carefully examined under working conditions and found to be in good working order.

The forward boiler was examined under steam and found in good working order.

The furnaces of the three after boilers were examined and the port aft and centre aft boilers were also examined internally and all found in good working condition.

The windlass and the steering engine were examined under working conditions and found in good working order.

On April 15th, 1916, the vessel was again visited and two of the main bearings of the crank shafts of both port and starboard main engines which had been opened out to ascertain surface conditions, as recommended, were examined and found in good order. Two small doors were also removed from the starboard main condenser for examination of tube ends, as recommended, and all found in good working condition.

During the examination of the machinery it was observed that the stern gland of the port tail and shaft requires repacking and it is considered that this should be done before the vessel again proceeds to sea.

This operation can be carried out afloat with the co-operation of a diver to temporarily plug the outer end of the stern bush.

Respectfully submitted,

JOHN H. MARSDEN,  
*Marine Surveyor.*

Newport News, Va., April 15th, 1916.

29                      *Affidavit of Hans Berg.*

Filed May 12th, 1916.

This day personally appeared Lieutenant Hans Berg and made affidavit as follows:

I have been officially furnished with a copy of the cablegrams sent by the German Embassy through the State Department to Germany, and a copy of the replies from Germany, and I attach the same to this affidavit marked "Exhibits 1 and 2." I have not secured all the necessary papers by the date set for this hearing, and I lack the following evidence.

A copy of the decision of the prize court.

I also state that I was not upon the Appam until the day after her capture and that I have no personal knowledge of anything that occurred aboard of her until I went aboard except what I could see from the Möwe; that the evidence of Count Dohna, the Commander of the Möwe, who knows what transpired during that time, what papers, if any, were removed and what else, if anything, was removed, is material, and I respectfully represent that it is necessary in order to properly prepare my defense that a commission issue in order to take his testimony: also to take the testimony of First Lieutenant Pohlmann, First Lieutenant Kuhl and others, who were sent in the small ship's boat to board the Appam at the time and know what transpired, the boat being in charge of First Lieutenant Pohlmann: none of them being now with me.

HANS BERG.

Subscribed and sworn to before me this 12th day of May, 1916.

M. C. COPELAND,  
Notary Public.

30 EXHIBIT NO. 1 WITH AFFIDAVIT OF HANS BERG.

Filed May 12th, 1916.

DISTRICT OF COLUMBIA,  
City of Washington:

I, Prince Von Hatzfeldt-Trachenberg, Counsellor of the Imperial German Embassy, Washington, D. C., being duly sworn, do depose and say as follows:

The official records of the Embassy show that, in order to facilitate the preparation and to expedite the trial of the Appam case, the German Embassy transmitted and received, relating thereto, the following Radio-grams:

Sent 1.

March 6, 1916.

Have Prize-Court immediately act on Appam case and send certified copies of the judgment of the prize-court. Also send certified copies of the commission of the commander of the Moewe and commission of Lieutenant Berg as an officer in the German Navy. Also send a certified copy of the commission of the Moewe itself as an auxiliary cruiser and other data required under the rules of International Law.

(Signed)

COUNT BERNSTORFF.

(Sent) #2.

March 14, 1916.

Please wire date on which papers are sent. Please hurry proceeding against ship in prize-court and wire judgment.

(Signed)

COUNT BERNSTORFF.

31

(Sent) #3.

March 21, 1916.

Hasten certified copies decision of prize-court in ship proceedings if possible before conclusion of cargo proceedings. Send certificate showing the date beginning preliminary proceedings of the prize-court in the Appam case. The libel was filed here February 16th. Court has set April 18th for trial.

(Signed)

COUNT BERNSTORFF.

(Received) #1.

BERLIN, March 19, 1916.

(Arrived March 21st.)

1.) The decision of the prize-court Hamburg in re Appam will be hurried as much as possible.

2.) The papers concerning the commission of the Moewe, the commission of the commander of the Moewe, the commission of Lieutenant Berg, extracts from Naval officers list and list of men of war will follow instantly. Please inform American court about impending arrival.

(Signed)

Foreign —, ZIMMERMANN.

(Received) #2.

BERLIN, April 3, 1916.

(Arrived April 5th.)

1.) The certificate that proceedings before the prize-court is pending since February 11th is on way.

2.) All other desired documents are equally en route.

3.) Proceedings of the German prize-court in re Appam are being expedited as much as possible, the condemnation of the ship is, however, impossible before beginning of May owing to the delays prescribed by the law.

4.) The judgment will be transmitted immediately after the delivery.

(Signed) Foreign —, JAGOW.

(Signed) PRINZ V. HATZFELDTRACHENBERG.

Sworn to before me, this 15th day of April, 1916.

[NOTARIAL SEAL.]

PAULINE M. WITHERS,

My commission expires Nov. 12, 1917.

DISTRICT OF COLUMBIA,

City of Washington, ss:

I, ——— do hereby certify that the affidavit made by Prince Von Hatzfeldt-Trachenburg, Counsellor of the Imperial German Embassy, Washington, D. C., hereto attached, is true and correct as attested by the original records of the Imperial German Embassy.

In testimony whereof, I have hereunto set my hand and affixed the seal [seal] of this office at the city of Washington, D. C., the 15th day of April, in the year one thousand nine hundred and sixteen.

J. BERNSTORFF.

UNITED STATES OF AMERICA,

Department of State:

To all to whom these presents shall come, Greeting:

I certify that Count J. von Bernstorff, whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as Ambassador Extraordinary and Plenipotentiary from Germany.

In testimony whereof, I, Robert Lansing, Secretary of State, have hereunto caused the Seal of the Department of

State to be affixed and my name subscribed by the Chief Clerk of the said Department, at the City of Washington, this fifteenth day of April, 1916.

ROBERT LANSING,  
*Secretary of State,*  
 By BEN G. DAVIS  
*Chief Clerk.*

(\*For the contents of the annexed document the Department assumes no responsibility.)

34

EXHIBIT No. 2 WITH AFFIDAVIT OF HANS BERG.

Filed May 12th, 1916.

BERLIN, March 19, 1916.

(Arrived March 21st.)

1.) The decision of the prize-court Hamburg in re Appam will be hurried as much as possible.

2.) The papers concerning the commission of the Moewe, the commission of the commander of the Moewe, the commission of Lieutenant Berg, extracts from naval officers' list and of list of men of war will follow instantly. Please inform American court about impending arrival.

(Signed)

Foreign ZIMMERMANN.

BERLIN, April 3, 1916.

(Arrived April 5th.)

1.) The certificate that proceedings before the prize court is pending since February 11th is on way.

2.) All other desired documents are equally en route.

3.) Proceedings of the German prize court in re Appam are being expedited as much as possible, the condemnation of the ship is, however, impossible before beginning of May owing to the delays prescribed by the law.

4.) The judgment will be transmitted immediately after the delivery.

(Signed)

Foreign JAGOW.

(Authentication certificates not copied. Waived by stipulation of proctors appearing hereafter.)



35

*Evidence.*

Before the Honorable Edmund Waddill, Jr., United States District Judge, at Norfolk, Virginia, upon the Hearing of the Above-entitled Cause on May 12, 13, 15, and 16, 1916.

*Proctors.*

Messrs. Frederic R. Coudert, James Ralph M. Bullowa, Howard Thayer Kingsbury, and Hughes & Vandeventer, for the Libellant.  
Messrs. John W. Clifton, Hughes, Little & Seawell, Norvin R. Lindheim, and Walter S. Penfield, for the Respondents.

36

*Evidence for the Libellant.*

Letter of Secretary Lansing to the German Ambassador.

Introduced by the Libellant.

MARCH 2, 1916.

His Excellency Count J. H. von Bernstorff, Imperial German Ambassador.

EXCELLENCY: I have the honor to acknowledge the receipt of your Excellency's note of the 2d of February, informing me that the British Steamer Appam, captured by the German naval forces, had arrived at Norfolk under the command of Lieutenant Berg of the Imperial German Navy, who intends, in accordance, as he believes, with Article XIX of the Prussian-American Treaty of 1799, to remain in American waters until further notice, and that the Appam has not been converted into an auxiliary cruiser, is not armed, and has taken no prizes under Lieutenant Berg's command. In conclusion Your Excellency requests internment in the United States during the remainder of the war of a military party belonging, your Excellency states, to the enemy of Germany, and also the internment of the crew of the Appam, inasmuch as they  
37 offered resistance to capture by His *by his* Majesty's forces.

I have the honor also to acknowledge the receipt of Your Excellency's note of February 22d, calling my attention to a libel which has been filed against the Appam by the United States District Court on February 16th by the British and African Steam Navigation Company, Limited, and to the fact that Lieutenant Berg has been cited to appear before the court on March 3d next, to answer this libel. Your Excellency points out that in view of the terms of Article XIX of the Treaty of 1799 and of the inoperation of The Hague Convention relating to neutral rights and duties in naval warfare, you are at a loss to understand why such action has been taken in this country. Your Excellency, moreover, asserts in effect that as the Appam flies the naval flag of, and belongs to, the German



Government, and as the possession of the captors is the possession of their sovereign, "the neutral sovereign or its court can take no cognizance of the question of prize or no prize and cannot wrest from the possession of the captor a prize of war brought into its ports." Your Excellency in conclusion *conclusion* pro-

38 tests against the action of the court and requests that the Attorney General instruct the proper United States District Attorney to take such steps as may be necessary and proper to secure the prompt dismissal of the libel.

Article XIX of the Treaty of 1799, to which Your Excellency refers, reads as follows:

"The vessels of war, public and private, of both parties, shall carry (conduire) freely, wheresoever they please, the vessels and effects taken (pris) from their enemies, without being obliged to pay any duties, charges, or fees to officers or admiralty, of the customs, or any other; nor shall such prizes (prises) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (conduites) out again at any time by their captors (le vaisseau preneur) to the places expressed in their commissions, which the commanding officer of such vessel (le did vaisseau) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (vaisseau) that shall have made a prize (prise) upon British subjects shall have a right to shelter in

39 the ports of the of the United States, but if (il est) forced therein by tempests, or any other danger or accident of the sea, they (il sera) shall be obliged to depart as soon as possible."

This translation is taken from the published treaties of the United States and while not conforming strictly to the original French text (a copy of which is enclosed), is sufficiently accurate for the purposes of this note. At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum for prizes brought into neutral ports by men-of-war, it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The Appam, however, as Your Excellency is aware, was not accompanied by a ship of war but came into the port of Norfolk alone in charge of a prize master and crew. Moreover,

40 the treaty article allows to capturing vessels the privileges of carrying out their prizes prizes again "to the places expressed in their commissions." The commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the Appam the commission of Lieutenant Berg, a copy of which was given to the Collector of Customs at Norfolk, not only is a commission of a prize master, but directs him to bring the Appam to the nearest American port and "there to lay her up." In the opinion

of the Government of the United States, therefore, the case of the Appam does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of the spoils of war in an American port. In this interpretation of the treaty, which I believe is the only one warranted by the terms of the provision and  
41 by the British treaties referred to in Article XIX, and *and* by other contemporaneous treaties, the Government of the United States considers itself free from any obligations to accord the Appam the privileges stipulated in Article XIX of the Treaty of 1799.

Under this construction of the Treaty the Appam can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of war, namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions, or necessity of repairs, but to leave as soon as the cause of their entry has been removed.

As to the grounds upon which the application for the libel of the Appam by the United States Court was made, this Department has no direct information; but it is understood that the libelant contends that the Appam is not, assuming that it is a prize of the German Government, the property of that Government, but that, on the contrary, the title to the vessel is now properly in the British owners. Whether in these circumstances the United States Court has properly or improperly assumed jurisdiction of the case and  
42 taken custody of the *of the* ship, is a legal question which, according to American practice, must now be decided by the municipal courts of this country. With the purpose, however, of having your Excellency's views as to this matter brought to the attention of the court, I have transmitted your note of February 22d to the Attorney General with a request that he instruct the United States district Attorney to appear in the case as *amicus curiæ* and present to the court a copy of Your Excellency's note.

As to the internment of the military party which Your Excellency states was on board the Appam, as well as the officers and crew who offered resistance to capture by His Majesty's ships, I have the honor to inform you that the Government has after due consideration concluded that they should be released from detention on board the Appam, together with their personal effects.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed)

ROBERT LANSING.

Enclosure: As indicated.

(Proper certificate of authentication attached.)

## Article XIX.

Les vaisseaux de guerre publics et particuliers des deux Parties Contractantes pourront conduire en toute liberté, partout où il leur plaira, les vaisseaux et effets qu'ils auront pris sur leurs ennemis, sans être obligées de payer aucuns impôts, charges ou droits aux Officiers de l'Amirauté, des Douanes ou autres. Ces prises ne pourront être non plus ni arrêtées, ni visitées, ni soumises à des procédures légales, en entrant dans le porte de l'autre partie, mais elles pourront en sortir librement, et être conduites en tout temps par le vaisseau preneur aux endroits portés par les commissions, dont l'officier Commandant le dit vaisseau sera obligé de faire montre.

Mais, conformément aux Traités subsistans entre les Etats-Unis et la Grande Bretagne, tout vaisseau qui aura fait une prise sur des sujets de cette dernière Puissance, ne sauroit obtenir un droit d'asile dans les ports des Etats-Unis; et s'il est forcé d'y relâcher par des tempêtes ou quelque autre danger, ou accident de mer, il sera obligé d'en repartir le plutôt possible.

*Testimony of Witnesses for the Libellant.*

WILLIAM DENNITTS, a witness for the libellant, after being duly sworn, testified as follows.

Examined by Mr. Floyd Hughes.

By Mr. Floyd Hughes:

Q. What is your name?

A. William Dennitts.

By Mr. Robert Hughes: We ask for the separate examination of the witnesses.

Witness for libellant sworn, and Captain Harrison allowed to remain in court.

By Mr. Robert Hughes: We have no witness in the room except Lieutenant Berg, so far as I know.

Mr. FLOYD HUGHES, resuming examination:

Q. What is your age?

A. Forty years of age.

Q. Your occupation?

A. Chief officer of the "Appam."

45 Q. How long have you been following the sea?

A. Twenty-eight years.

Q. What kind of a certificate do you hold?

A. Master's certificate.

Q. How long have you held that Master's certificate?

A. Nine years.

Q. When did you go on the Steamship "Appam"?

A. In February, 1913.

Q. Where was she then?

A. In the ship-builder's yard at Belfast, Ireland.

Q. Under construction at that time?

A. Yes, sir.

Q. And building for what company?

A. The British and African Steam Navigation Company, a British corporation.

By Mr. Robert Hughes: We object to the incorporation of ownership testified to by this witness.

Q. In whose employ are you?

A. The British and African Steam Navigation Company, Limited.

Q. And how long have you been in such employment?

A. Nine years.

Q. On what vessel?

A. Various vessels belonging to that company.

46 Q. On whose behalf did you go to join the "Appam" at Belfast?

A. On behalf of the British and African Steam Navigation Company, Limited.

Q. And you say that was the company that built it?

A. Yes, sir.

Mr. Robert Hughes: We ask Your Honor to rule on the question whether a corporation can be proved in that way, or not?

Mr. Floyd Hughes: We will have other testimony on that point.

By the Court: Let it come in subject to exception.

Q. You went on the "Appam" in what capacity?

A. I went on the "Appam" as first officer. I was superintendent at the time she was finished.

Q. And have continued in her until the present day?

A. Yes, sir.

Q. Were you on the "Appam" when she left Liverpool on the thirteenth voyage?

A. Yes, sir.

Q. What was her condition with respect to being seaworthy or unseaworthy, so far as your Department was concerned?

A. She was in first class order and seaworthy.

Q. Where did she first proceed generally?

A. To the west coast of Africa.

47 Q. And took on the cargo?

A. Took on the cargo.

Q. What kind of a cargo was that?

A. A general cargo of West African trade goods.

Q. Will you describe generally of what the cargo consisted?

A. The cargo consisted of coc-a beans, palm oil, palm kernels, tin, maize, —, and some other small items.

Q. Who receipted for that cargo?

A. I receipted for that cargo.

Q. You issued a chief mate's receipt?

A. Yes, sir.

Q. How were the manifests made up? covering that cargo?

A. The manifest was made up by the receipt.

Q. By whom?

A. By the purser.

Q. Are they not checked up by you from your receipts?

A. Yes, sir.

Q. You checked his matter up by your receipts as against the manifest?

A. Yes, sir.

By Mr. Robert Hughes: Q. This manifest was produced by Lieutenant Berg in response to a subpoena duces tecum.

Mr. Floyd Hughes to Mr. Robert Hughes:

48 Q. Did you not have an epitome of the cargo with this manifest?

Mr. Robert Hughes: There is one, and I will give it to you. You did not ask for that.

Mr. Floyd Hughes:

Q. Will you please examine the manifest and the epitome, and state whether the cargo called for by the manifest were received on board the "Appam" and receipted for by you and the manifest found to correspond with those receipts. (Said paper produced by Mr. Robert Hughes.)

A. Yes, sir, that is the manifest, and I checked it off and they are correct.

Q. Did the "Appam" take on any passengers at West Africa?

A. Yes, sir.

Q. Will you state the number of your crew? and passengers substantially at the time you first saw the "Moewe"?

A. One hundred and sixty crew and one hundred and seventy passengers, about.

Q. Of those passengers, did you have any German?

A. Yes.

Q. How many all told.

A. Twenty-two.

Q. How many men and how many women?

A. Nineteen men, three women.

Q. Were there any military prisoners?

49 A. Yes, sir, eight of them military prisoners.

Q. Now, Mr. Dennitts, will you please state the circumstances of sighting the "Moewe" and what happened?

A. On January 15th, in the afternoon, it was my watch below, and I was asleep. I heard a gun fired, and got up on the bridge. Seeing a steamer flying the German ensign on our starboard side, which signalled to us to stop instantly, we stopped and they lowered boats, and put armed men aboard two or three boats and took charge



of the ship. A man came in officer's uniform, and said "Captain Harrison, I am very sorry, but I must take your ship." And he ordered Captain Harrison and the officers and the sailors to go aboard the Moewe, which we did.

Q. Did you hear any conversation between that officer and Captain Harrison on the bridge?

A. Yes, sir.

Q. Will you state what you heard?

A. He said, "I am very sorry, Captain, but I must take your ship." He asked him how many passengers he had, and he told him about one hundred and seventy; what cargo we had, and what fuel. Did we have any coal aboard, and he told him yes. And all this was being signalled across to the ship alongside of him. Then he told Captain Harrison that himself and officers and all the sailors must go on board the Moewe, so we went across to the Moewe in a boat, and were put down in the hold of the Moewe. We were

50 kept there for two days, and *and* then on the evening of the 17th we were ordered to go back to our own ship. We went back, and were kept on board the "Appam" as prisoners.

Q. When did you see Lieutenant Berg for the first time?

A. On Monday, the 17th, on board the "Moewe."

Q. Monday afternoon?

A. Yes, sir.

Q. In what capacity was he on the "Appam" then?

A. He was in charge of the "Appam."

Q. State if you had an interview with him, and if so, state what the substance of it was.

A. No, I had no interview with him at all at that time.

Q. Did he give you any consideration?

A. Not that day. The next day he asked me to clean the ship down. He asked me would I, and I said I would, and did.

Q. You had your deck force do that?

A. I had the "Appam's" deck force do that. We also got the life boats ready and overhauled them to see that they were all right. On going into port on January the thirty-first, or rather, the day before, we got the anchor ready. That was on the thirty-first of January. And we arrived at Hampton Roads on the 1st of February. Myself and my own crew let go the anchor.

51 Q. Why did you do that?

A. Because Mr. Berg asked me to do so. He said he had not got the men to do it.

Q. How about moving from Hampton Roads to Newport News?

A. When we went from Hampton Roads to Newport News at half-past seven in the morning, Mr. Berg asked me to get ready to heave up the anchor when she went up the river. I was all ready at half past seven but the pilot had not come aboard; at eight o'clock he came, and I went down to breakfast; about five minutes after eight Mr. Berg sent for me and told me the pilot was on board, or sent a message to tell me the pilot was on board, and he wanted me to heave the anchor. I sent word back I would come as soon as I had had my breakfast. I came up about twenty minutes past eight.



Mr. Berg was very much annoyed because I had kept him waiting. I hove up the anchor then, and we proceeded up to Newport News, and there I let the anchor go again.

Q. Mr. Dennitts, what was the condition of the "Appam" in respect to seaworthiness at the time she was captured?

A. She was in first-class order, and quite seaworthy.

Q. And how as to the same conditions when she arrived at Hampton Roads?

A. She was still in first-class order and seaworthy.

Q. When she was captured, did you see any bombs placed on her, or near her?

A. Yes.

52 Q. Please describe that.

A. As soon as the boat's crew came from the "Moewe," they strung over the bow and over the stern two bombs. Afterwards when I came back on the 17th to the "Appam" from the "Moewe," they had one large bomb on the bridge, which I saw. They said it contained two hundred pounds explosive; one in the engine room, tied to a part of the machinery, and also several small ones in the chart room. That is all I saw.

Q. And did they continue in position during the trip to Hampton Roads?

A. Yes, sir, in the same position to Hampton Roads.

Q. When were they removed, do you know?

A. I do not know.

By the Court:

Q. When were they placed there?

Mr. Floyd Hughes: When the ship was first captured two bombs were placed in the water forward and aft, afterward they were moved when the ship got under way, and then one was placed on the bridge, and another in the engine room to a part of the machinery, and several others in the chart room.

Q. What became of the German prisoners on the "Appam"?

A. The German prisoners, with the exception of two who went aboard the "The Moewe," remained on board the "Appam" and kept guard over us as prisoners.

53 Q. Did all of these participate in keeping guard, or how many?

A. Seventeen of the men, that is all, seven military prisoners and ten civilians.

Q. One of the military prisoners remained upon the "Moewe"?

A. Yes, and that left seven.

Q. Were the civilian German prisoners distinguished by any mark?

A. Yes, sir, by a white band on the arm with the name "Dutch Landstrum," and had rifles and revolvers.

Q. What use did they make of them?

A. They kept guard over us in various parts of the ship, receiving their orders from Mr. Berg.

Q. Did the former officer- and crew of the "Appam" take part in navigating the ship?

A. Yes, all the engine room staff, engineer, firemen and trimmers, and all that department worked.

Q. Were there any Germans there?

A. There was the guard in the engine room.

Q. It was simply a guard, none of the Germans performed any duties in the engine room?

A. None whatever.

Q. How about the navigating or bridge department?

A. Navigating was done by the Germans.

Q. Did that include both the navigating officer and quarter-master?

54 A. The Navigating Officer and Quartermaster all Germans.

Q. How about the Lookout?

A. They were mostly kept by civilian prisoners that were on board.

Q. So the deck force under you attended only to cleaning up ship and matters of that kind?

A. That is all.

Q. You have stated something already about the seaworthiness of the ship with respect to her hull upon arrival at Newport News. Did the officers under you report to you, or not, with respect to the ordinary condition of the ship during the voyage west?

A. Yes, sir, the carpenter takes the soundings every day in all departments of the ship, and he reports to me at eight o'clock in the morning, and four in the evening if there is any water in the ship, and it is entered in the log book.

Q. And those reports you received up to the time of the capture?

A. Yes, up to the capture, and entered in the log book, after which, not having the log book, I could not enter them. The log book was taken from me.

Q. I notice on the epitome of the manifest an entry of sixteen boxes of bullion. What kind of bullion was that?

A. Gold bar taken aboard at Seponta.

Q. Did you see it come aboard?

A. I saw it and gave a receipt for it.

55 Q. Will you tell me where the "Appam" was captured?

A. The "Appam" was captured 33.19 North and 14.24

West.

Q. That means latitude and longitude respectively?

A. Yes, sir, latitude first.

Q. And the capture took place about what time in the afternoon?

A. About three P. M.

Q. Had you taken any observations and located the ship on your chart.

A. Yes, sir. I had taken an observation at noon, and put the position on the chart, and at three o'clock when we were captured, we also, Captain Harrison and I, put the position of the capture.

Q. Have you marked the position of the capture on the chart, and if so, will you please mark that place with the letter "A."

A. That is the position marked "A."

By Mr. Floyd Hughes: Q. I offer the chart in evidence and ask that it be marked.

Q. Will you give approximately the distances to the nearest port?

A. The nearest port is Punchello, in Madeira, one hundred and thirty miles.

Q. Have you on this chart marked the distances to the various ports?

A. Yes, sir.

56 Q. Will you state the distance from the place of capture to Plymouth, England.

A. Plymouth, England, 1,119 miles.

Q. Have you ascertained in connection with the chart and the chart marked "B" the distance from the point of capture to the German port of Emden?

A. Yes, sir.

Q. Please state what that is.

A. The distance is 1,590 miles.

Q. And to the port of Bremen-Haven.

A. 1,635 miles.

Q. And to Hamburg?

A. 1,690 miles.

Q. To Teneriffe?

A. 306 miles.

Q. To Norfolk?

A. 3,051 miles.

Q. What was the approximate distance to Liverpool, your port of destination?

A. 1,450 miles, approximately.

Q. How about the provision and supplies, including fuel, on the "Appam" with reference to her reaching her destination, Liverpool? Were they sufficient?

A. We had plenty of provision, supplies and fuel, and about twenty-five per cent. margin of safety.

57 Q. How were the provisions and stores upon reaching Hampton Roads?

A. We had plenty of provision. We were kept on short commons, but had sufficient to eat.

Q. How did the company on the "Appam" after the capture compare with the company on her before capture?

A. What do you mean by "company"?

Q. I mean all souls on board.

A. We had about one hundred and fifty more persons.

Q. How did that come about?

A. We received from the "Moewe" the crews of six or seven ships already sunk.

Q. So you had 150 or 160 more souls on board than at first, after your ship was started westerly?

A. Yes, sir.

Q. Did you say anything about water?

A. There was plenty of water. It was allowanced out.  
 Q. Was your ship equipped with any operators for manufacturing water?

A. Yes, sir, we had a very fine distilling apparatus.

Q. Do you know the capacity?

A. Yes, sir, about three thousand gallons per day of fresh water.

Q. Had that apparatus been used on previous voyages?

A. Oh, yes, and found very satisfactory.

Q. Will you describe generally the course of the "Appam"  
 58 after you returned aboard on January 17th?

A. From the 17th, the first two or three days, we took a course south-westerly, about the 19th we proceeded in a westwardly direction, heading towards the United States.

Q. Did you take observations of your course yourself?

A. Yes, sir. I done it by dead reckoning.

Q. You were not allowed to look at the ship's instruments?

A. Not allowed to look at the ship's compass or instruments.

Q. When did she first head her course for Hampton Roads, about?

A. About the 20th, I should say, the 20th of January.

By the Court:

Q. What was the course, southwest?

By Mr. Floyd Hughes: He said westwardly.

By Mr. Floyd Hughes:

Q. Was it a direct or a varied course?

A. Varied for the first two or three days.

Q. Were you in communication with the "Moewe" after the 17th?

A. We sighted her, supposed to be her, on the 23rd. I heard the wireless working to her.

59 Mr. Floyd Hughes: We offer the manifest, including the epitome, in evidence, produced by Commander Berg.

Q. You have stated that civilian prisoners on the "Appam" afterward did guard duty on the western voyage?

A. Yes, sir.

Q. And had an armulet over their citizen's clothes?

A. Yes, sir.

Q. Did that armulet remain until you arrived at Hampton Roads?

A. The morning we arrived at Hampton Roads, they were off.

Q. How long before that had it been taken off?

A. I seen it the night before.

Q. But they were not on the sleeves the next morning?

A. The next morning, no.

Q. When you left the "Appam," who remained on board?—by the way, when did you leave?

A. I left on the 3rd of February.

Q. Who was then on board?

A. Mr. Berg, twenty-two prize crew and the civilians and these military prisoners, about twenty in all of the civilians and military.

Q. And the crews of the captured ships, and your passengers,

60 with the exception of those retained on the "Moewe" have left the "Appam" in this port?

A. They left at the same time, or just previous to when I did.

Q. When they removed the armulets from the sleeves, what about the weapons?

A. The weapons were removed at the same time. They had no weapons when we arrived at Hampton Roads.

Q. In the answers to the interrogatories by Mr. Berg, he places the position of the "Appam" at the time of capture, latitude 35.05 north, and longitude 14.20 west. How does that vary from the position of capture as given by you? (This was afterwards corrected and appears later in the record as 33.05 latitude. Stenographer).

A. About one hundred miles north of the position given by me.

Q. How would that affect the distance of the point of capture from the ports of Liverpool, Emden, Hamburg or Bremen-haven?

A. About one hundred miles shorter than the distance I gave.

Q. And how would it affect the distance from Hampton Roads?

A. It would be about the same distance.

Q. Did you observe whether or not there was any communication between Mr. Berg and the "Moewe" by means of a boat, or  
61 by any means other than signals after you returned on January 17th to the Appam?

A. No, sir, there was no further communication by the boat at all.

Q. What is the general character of the "Appam"?

A. She is a passenger and cargo boat.

Q. Can you give me, so as to get it in the record here, the general dimensions?

A. She is four forty feet long, fifty-eight feet broad, thirty-five feet deep, tonnage seventy-eight hundred gross.

Q. I think you have stated her ordinary crew. Could you give that of all the departments?

A. No, sir, only the number.

Q. How many did you have in the deck department?

A. Captain, three officers, one Marconi, sixteen sailors, including the carpenter on deck; in the engine room eight engineers, including the electrician; fourteen firemen; seven trimmers, and six oilers. The majority were mostly stewards, about ninety, that is, engaged in serving and feeding the passengers and the others.

Q. Are you in any way connected with the British Admiralty?

A. None whatever.

Q. Not what is known as a "naval reserve man"?

A. No, sir.

Q. Has the "Appam" been connected with the British  
62 Admiralty in any way since the war began, or since she came from the stocks?

A. She was when the war started. She had been engaged for a while as a transport.

Q. How long before the capture had she returned to the ordinary service?

A. Over twelve months.



Q. And on this trip she was purely a merchant ship?

A. Yes, sir. Over twelve months.

Q. With her ship carrying ordinarily the crew you have described, could she ordinarily be safely navigated with a prize crew consisting of Mr. Berg and twenty-two other officers and men?

A. No, sir, she could not be handled by that number, too small.

Q. On approaching the American Coast, what was done with you and the other members of the "Appam" crew?

A. The night before we arrived in Newport News, we were ordered down below, and were not allowed on deck.

Q. At what time?

A. Nine o'clock at night.

Q. Did you, or not, become sufficiently acquainted with the German prisoners on your ship before the capture to recognize them?

A. Yes, I could recognize them.

63 Q. Were the men that came with Mr. Berg in uniform?

A. In uniform; the ordinary navy uniform, blue sailor collars.

Q. What officers were in uniform?

A. Mr. Berg was the only one.

Q. I mean, was he the only one with officers' uniform?

A. Yes.

Q. You have stated that you are not yourself in the Naval Reserve. Was the captain, or any officers or crew, of the "Appam," to your knowledge a member of the Naval Reserve?

A. No, sir. Neither captain, officers nor crew of the "Appam" were naval reserve men.

#### Cross-examination.

By Mr. Robert Hughes:

Q. Chief, I did not catch the number of crew in the deck department of your ship before the capture. How many were there?

A. Twenty-one in the deck. Captain, three officers, a Marconi operator, and sixteen sailors.

Q. How many in the engine room department?

A. Thirty-five.

Q. How many boilers had you?

A. Four.

64 Q. Did you have eight engineers?

A. Eight engineers, including the electrician.

Q. You say that the "Appam" was in first-class order when she left Liverpool?

A. Yes, sir.

Q. Had she had any accident on that voyage?

A. She touched slightly on a bar in the river in W. Africa, but there was no damage done to her, nor did she make water.

Q. How long did she remain when she touched ground?

A. We stopped there for a day, twelve hours.

Q. She got aground only once?

A. She only touched, but did not stop, once or twice.

- Q. Was not she aground at one time for several hours?  
A. At one time, yes, I said that.  
Q. How long that time was she aground?  
A. I can not remember how many hours, I should say eight or nine, perhaps, twelve, I cannot say, I do not remember.  
Q. Did the "Appam" have any arms or armament?  
A. Yes, sir, a small gun on the stern. A three-pounder.  
Q. Did she have a trained crew who knew how to handle it?  
A. She had two, men supposed to know how to handle it, signed on as ship's crew.  
Q. Were they in the British Naval Service?  
A. They were not at the time they signed the articles.  
65 Q. Had they been at any time before they signed the articles?  
A. I think they had been, but cannot say for sure.  
Q. You say, on the capture, you saw the "Moewe" flying the German flag?  
A. Yes, sir.  
Q. Any special distinctive flag that she was flying?  
A. The German Admiralty flag carried by a German warship, I believe, different from a merchant service flag.  
Q. What was the first communication you had from the "Moewe"? Did you hear her personally, or see her?  
A. The first was a signal from the "Moewe," two flags signaling "stop instantly"?  
Q. And then she was flying the German flag you speak of?  
A. Yes, sir.  
Q. Did you all make any show of resistance?  
A. No show whatever.  
Q. Did not some men go back and start to man the gun?  
A. No. Started to dismantle it. Not man it.  
Q. Started to put a cartridge in?  
A. No, sir. No cartridge put in.  
Q. Was not a shot fired from the "Moewe"?  
A. Yes, sir, there were two shots, from a big gun and a rifle.  
66 Q. They were Missing shots?  
A. Not to hit. They were very close.  
Q. Did they hit anybody?  
A. No. It was very close.  
Q. How far were the ships apart when the rifle shot was fired?  
A. About one hundred yards, I should say.  
Q. Where were you at that time?  
A. At the stern.  
Q. Near the gun?  
A. Near the gun.  
Q. Did the bullet from that rifle—you mean an ordinary army rifle, not a rifled gun?  
A. No, a rifle.  
Q. Did the bullet strike the ship?  
A. No. It whistled by.

Q. It sounded close?

A. It sounded pretty close, yes.

Q. And it was fired at a distance of about one hundred yards?

A. Yes, about that.

Q. You were one of the officers who were then brought aboard the "Moewe"?

A. Yes, sir.

67 Q. Was the "Appam" navigated entirely by the German crew from the time you left them until you went back to them?

A. I do not know. I was not there.

Q. Didn't you say all the navigating officers were taken on the "Moewe" with you?

A. No, sir, the second officer was kept aboard the "Appam."

Q. Now, as I understand, these distances that you have given from the point of capture to Emden are distances by the shortest route that a vessel could take?

A. Yes.

Q. In other words, that distance from the point of capture to Emden is through the English Channel?

A. Yes.

Q. And by that distance, you make the distance to Emden, which is the nearest German port, 1,590 miles?

A. 1,590.

Q. Is it not fairly well known to you that there happen to be some British and French Men-of-War in the neighborhood of the English Channel?

A. Yes, I believe there were.

Q. Also a few mines floating around there, too?

A. Yes, sir, a few.

Q. And a vessel in charge of a German crew would not be apt to have a key to navigate through the mines if they escaped the cruisers?

68 A. Probably not.

Q. Suppose that a German ship in time of war, with those little obstacles in the way, should want to go into Emden, and you were a German in command of her, would you take that course?

A. As I am not a German, I do not know what I would do.

Q. Suppose you are English, and the situation reversed, and that the English Channel was guarded by German ships, and German mines, as closely as it is guarded by the English ships and the English mines, would you take that position?

A. It takes a position to suppose it; I cannot suppose that.

Q. It is impossible to think you would take such a course under such circumstances, is it not?

A. No, I do not know.

Q. Now, as a matter of fact, is not the English Channel thoroughly guarded, and is there not an English guard line of ships practically controlling the waters all the way from Scotland to Iceland?

A. I do not know, I have not been there lately. I have not been

in those waters lately. Ships do go through, I know. English ships go through the English Channel. It is not impossible. English merchant ships go through.

69 Q. You say you made an estimate of the course you steered by dead reckoning?

A. Yes, sir.

Q. Do you mean by that from your general knowledge of the speed of the "Appam," the number of miles she would make a day?

A. Yes. And the course she was steering?

Q. You did not have a compass?

A. We had a little, small compass, not any big compass; we were not allowed to look at that, but we had a very small compass, but very accurate, and we could guess the rising and setting of the sun and could judge the compass by that.

Q. While you say that at first your course was varying, it was generally south-westerly?

A. Generally south-westerly course, that was not our position all the time.

Q. You fixed that course more by the sun than by the accuracy of the little compass you speak of?

A. Yes.

Q. Is that also true as to the course you gave as the westerly course, fixed by the sun and stars?

A. Yes, fixed by the sun and stars, the sun mostly.

Q. At night were you all generally allowed on the deck or not?

A. Yes, sir. Except the last night.

70 Q. Everything was darkened the last night?

A. Everything was darkened the whole time.

Q. I did not understand you to state that what Lieutenant Berg ordered you to do was by way of complaint, but the cleaning he asked you to do, and other work, you and your crew did.

A. He asked would we clean the ship down, and I said we would, with the sailors.

Q. And you did it without making any difficulty?

A. As far as the deck was concerned, yes.

Q. Do you know anything about the amount of coal she had on board when she came in?

A. Only approximately.

Q. You only know she did not have enough to carry her much further?

A. Not when she got into Newport News.

Q. Now, as to provision, you say you had been on short allowance for some time?

A. Yes, sir, shorter than we had been before in ordinary times.

Q. You had over five hundred men on board, including one hundred and fifty prisoners and twenty-two crew—prize crew.

A. Yes, sir, we had about that number.

71 Q. Didn't part of your cargo, as shown by your manifest, consist of machine guns and cartridge cases for the British Government?

A. I do not think there were any machine guns. If so, I am not aware of it.

Q. I mean parts of machine guns, incomplete guns. Please refer to your manifest, near the end of the fifth page, and see whether it does not show that a part of your cargo consisted of one package of Maxim guns.

A. Yes.

Q. And one case of empty fuses?

A. Yes, sir.

Q. Do you know where the crew, or how many there were in number that were to handle your guns and signed on?

A. They were signed on the ship's articles in Dekker, I believe, in Africa.

Q. Is that the general practice with gunners aboard to enter them on the crew list?

A. I do not know the general practice. It is the first time I ever had a gun. I do not know what other ships do.

Q. Where was the gun itself taken on?

A. At Dakar.

Q. Did they come on at the same time as the gun?

A. They came at the same time as the gun.

Q. I do not understand exactly what kind of uniform the prize crew had. You say Lieutenant Berg had an officer's uniform. Did the others have the ordinary uniform of German sailors on a war ship?

A. The ordinary sailor's uniform such as any naval sailor wears.

Q. You mean a public ship as distinguished from a merchant ship?

A. Yes.

Redirect examination.

By Mr. Floyd Hughes:

Q. You have been asked about whether the ship when trading on the West African coast had been aground on this particular voyage.

A. Yes.

Q. Had she been aground more than usual on this voyage, as compared with other voyages?

A. No, just about the same.

Q. Will the vessel grounding in any way affect her seaworthiness?

A. None whatever. It is just soft mud.

Q. I think you have already stated that you received regular reports from the carpenter until the day prior to coming into Hampton Roads that there was no water in the ship.

73 A. Yes, sir.

Q. Can you tell me whether Hatch No. 4 hold was taken off after the capture at any time?

A. Not of No. 4, owing to the passengers being there.

Q. Do you know what cargo was in No. 4 hold?

A. Kernels and maize. And I think some other cargo.

Q. What would be the natural effect of the hatches remaining over that hold from the time the ship was captured up to the 10th of April.



A. There would be a large amount of "sweat" take place among the kernels.

Q. Approximately how much would that be, say in inches.

A. Probably in the bottom of the hold three or four inches of water, if it was not ventilated.

Q. Would that affect the seaworthiness of the ship in any respect?

A. Oh, no, it could be pumped out. It would lead to small damage to the bottom layer of the cargo, that is all.

Q. About this gun that was taken on at Dakar, was that the gun referred to in that manifest, or a different one?

A. No, that is only scrap material, scrap metal. It was not shipped as a man, boxed up and supposed to be scrap metal parts

74 of a gun.

Q. It was not a completed gun ready for use?

A. No, it was represented as being scrap beyond repair.

Q. And the gun you took on at Dakar was placed where?

A. On the stern.

GEORGE PORTER ASHBURNER, another witness for the libellant, sworn, testified as follows, examined by Mr. Floyd Hughes.

By Mr. Floyd Hughes:

Q. Please state your name and age.

A. George Porter Ashburner, forty-eight years old.

Q. Your occupation.

A. Marine engineer.

Q. Your residence?

A. Liverpool.

Q. You are an Englishman by nationality?

A. Yes, sir.

Q. How long have you been at sea?

A. About twenty-five years.

Q. You have been a marine engineer that length of time?

A. Yes, sir.

75 Q. What certificate do you hold?

A. Chief Engineer.

Q. How long have you held that certificate?

A. About eighteen years.

Q. In whose employment are you now?

A. The British and African Steam Navigation Co., Limited.

Q. How long have you been with that company?

A. Over twenty-one years.

Q. What connection have you with the Steamship "Appam"?

A. I am chief engineer.

Q. Since what time?

A. Since she was built.

Q. Did you attend on the "Appam" before she went into commission? And on whose behalf?

A. Yes, on behalf of the British and African Steam Navigation Company, Limited.

Q. For what purpose, and in what capacity?

A. As chief engineer of the "Appam," and previous to that I was

over to see her sister ship, and also the "Appam" as assistant superintendent engineer.

Q. How long was that before the "Appam" went into commission?

A. About three months.

76 Q. Did you do anything on that occasion with reference to the "Appam," and if so, what?

A. Yes, I suggested several minor alterations, which were made.

Q. Knowing you were going on board as chief engineer?

A. Yes.

Q. How long before she went into commission did you join her?

A. About a fortnight.

Q. And where was she then?

A. She was then at Belfast.

Q. When was that, what year?

A. That was three years ago, 1913.

Q. And you have been chief engineer of that steamship since that time, have you?

A. With the exception of her twelfth voyage.

Q. On the thirteenth voyage, were you chief engineer?

A. Yes, sir.

Q. When did you join the ship prior to that voyage?

A. A few days before she sailed.

Q. Did you have any occasion to examine into the condition of her engines before she left Liverpool on her thirteenth voyage?

A. Yes, sir.

Q. In what capacity?

A. As chief engineer, when I joined her. Previous to joining her, as assistant superintending engineer.

77 Q. Were not repairs made upon her before she left Liverpool, and if so, of what character? Were those repairs so far as the engines were concerned?

A. Yes, sir, there were repairs, but only of minor importance, ordinary wear and tear.

Q. And you say they were completed before you sailed, did you?

A. I did.

Q. What was her condition so far as her engines were concerned and with respect to seaworthy or unseaworthy?

A. First-class.

Q. How about that condition continuing up to the time of her capture?

A. She was in good condition.

Q. How about that condition continuing up to the time of your leaving the ship after she came into Virginia ports?

A. In good condition.

Q. Chief, the surveyor, Mr. Marsden, has stated in his report that "During the examination of machinery, it is observed that the stern gland of the port tail end shaft required repacking, and it is considered this could be done before the vessel proceeds to sea." What

have you to say with reference to that—as respects seaworthiness or unseaworthiness?

A. It would not affect her seaworthiness in the slightest.  
78 I should have taken her for a three or four months' voyage without the slightest hesitation.

Q. Mr. Ashburner, do you recall how much coal your steamer had when she took her final coal on in West Africa?

A. Yes, sir, about 900 tons when we left Sierra Leone.

Q. How much coal did she have when she was captured, approximately?

A. About 560 tons.

Q. And how much coal did she have when she arrived at Hampton Roads?

A. About sixty tons.

Q. You were on the voyage to Liverpool?

A. Yes, sir, via Plymouth.

Q. With five hundred and sixty tons of coal on at the place of capture, how was that with respect to having sufficient coal for safe navigation to the point of destination, and with what margin?

A. I estimated I would have a margin of about two hundred tons on arrival at Liverpool.

Q. What is your average consumption of coal per day at sea, at ordinary full speed?

A. About sixty-five tons.

Q. Now coming down to the scene of capture, I wish you to tell the court in your own way what you observed in connection with that incident.

79 A. Well, on the day we were captured, I was in my room asleep. I was awakened by the report of a gun. I went out on deck and walked forward, and saw a ship there flying the German flag, with guns trained on our ship. In a short time afterwards I saw the Germans board our ship. I went up on the bridge and was told that we would all have to leave the ship. I went down to tell my staff to get ready to leave the ship, and then later, about five minutes' time, I received a message that the engineering force and all the engineering staff would remain on board ship. I was then sent for and a man on the boat's deck, the senior German in charge of the boarding party, asked me if I was the chief engineer. I replied that I was. He told me that I was now a member of the German Navy, and I said I did not think I was. He said it was no laughing matter, and if I did not obey his orders he would blow my brains out, but that if I obeyed his orders, not a hair of my head would be touched. He also told me to tell my staff, and if they did not obey my orders, I must bring them up to him and anyone who disobeyed would be shot. He asked me the amount of coal on board, also the various revolutions and consumption for different speeds. I went down to my room, called the second engineer, and told him what I had been told. I then prepared the data that he asked for and took it up to him.

By the Court:

Q. Who was this talking to you?

80 A. This was the senior man in charge of the German boarding party. He then told me to keep steam handy. Later on, about six o'clock that evening, they got under way, and he told me the revolutions that he required. I set the engines as directed. He also told me to report to him every morning at eight o'clock. I reported the following morning at eight o'clock, told him the tonnage of coal and the stores that I had. The following day, on going up to report, Mr. Berg was there, and he told me that he was now in charge of the ship, that he expected me to help him all I could, and the more I did for him, the better it would be for everybody on the ship. I said I would. He then asked me about the coal on board ship. He also asked me for the revolutions and consumption for the different speeds. I told him that I had already given this to the senior officer, and he replied that he wanted me to make it out again for him. That was on Monday morning, and we were captured on Saturday. I went to my room and prepared this for him, and handed it to him, and he asked me to report every morning at eight o'clock, which I did all the way across.

Q. From whom did you get orders with reference to the working of your engine from that time on, from the morning of January 17th?

A. I got my orders from Mr. Berg, sometimes through a messenger, the messenger being one of the German passengers.

Q. As I understand, there was another German officer in charge of the "Appam" up to, as far as you know, Monday morning  
81 when you first came in contact with Lieutenant Berg?

A. Yes.

Q. Had you seen him on the "Appam" before Monday morning?

A. I had not seen Lieutenant Berg before Monday morning.

Q. And from that time on he was in command of the "Appam", and you got your orders either directly or indirectly from him?

A. Yes.

Q. What became of the officers of your ship other than the engine staff?

A. They were taken over to the raider, on Saturday when we were captured.

Q. Were all the officers taken?

A. No, the second officer was left behind.

Q. And they got back what time, do you remember?

A. I think it was Monday afternoon when they came back, yes, Monday afternoon.

Q. What was done after they came back, so far as the operation of the "Appam" was concerned?

A. My department just worked as we did on an ordinary voyage. There was a guard below, a guard of Germans, four or five of them, armed; they relieved each other. They were constantly in the engine room, but did not interfere with the working of the engines—simply kept guard over us and looked on.

82 While coming across to America there was a bomb put down below

and secured to the port main injector valve. There was a German sailor put alongside of this bomb, with a revolver. The bomb was taken up to the engine room the night we arrived in Hampton Roads.

Q. Did you see any other bombs on this ship?

A. Yes, I saw a bomb on the bridge. On the starboard side of the bridge. I also saw bombs in the chart room.

Q. When the ship was first captured, did you notice whether there were any other bombs placed in or near the ship?

A. When the Germans first came on board the ship, I noticed what were apparently bombs on the forward deck.

Q. Did you notice whether any were put out afloat or not?

A. I did not see any out afloat.

Q. You have stated that guards were placed in the engine room and that a special guard was placed at the bomb in the engine room. Did you see other guards in other sections of the ship?

A. Yes, I saw guards about the deck. We had passengers, German passengers, some being prisoners of war, some of whom we were taking to England, I believe, to be interned. The prisoners of war and the other German passengers all bore arms who kept guard. The civilian passengers had a white band on their left arm, printed in black "Dutch Landstrum". These men kept guard. One of them I saw keeping lookout on the bridge. I saw him using the binoculars. These men continued to keep guard and wore their bands until the night before we reached Hampton Roads. We were not allowed on deck after nine o'clock at night. Previous to arrival at Hampton Roads, when I came on deck the next morning, these men, German civilians who had been wearing the bands, were not wearing the bands, nor were they carrying fire-arms or any arms.

Q. Do you remember how many Germans were taken on board your ship in West Africa, how many women and how many men?

A. Well, I think about fifteen civilians, and about six soldiers, war prisoners, three or four women.

Q. The six war prisoners, how were they dressed?

A. They were dressed in Khaki.

Q. And the others in ordinary civilian clothes?

A. Yes, sir.

Q. And after they commenced to stand watch they had this armulet?

A. Yes.

Q. There was a prize crew placed, of course, on the "Appam"?

A. Yes, sir.

Q. How were they dressed?

84 A. In ordinary naval clothing.

Q. The ordinary clothing of a naval sailor?

A. Yes, sir. They had not all the same bands or the same caps, but all had ordinary naval caps and ordinary naval clothing.

Q. How many were in officers' uniform, or did you notice?

A. When we were first captured, there were two or three there. But after Mr. Berg took charge there was only one in officer's uniform, and that was he.



Q. Were these civilian Germans on board the "Appam" when you left?

A. The German civilian prisoners, yes.

Q. Have you seen any of them since you left, and if so, where?

A. Yes, I saw one in Nassau Street, New York.

Q. Now, you have spoken of the instructions given by the officer with reference to your brain and your hair, and the message to be sent to your crew?

A. Yes, sir.

Q. You say those instructions were afterwards accompanied by a man stationed armed in the engine room?

A. Yes, sir.

Q. Did that continue all the way to the time of your reaching Hampton Roads?

A. Yes, sir.

85 Q. How did you and your engine force work under those conditions, willingly, or under compulsion?

A. Naturally, it was under compulsion. We did not want our brains blown out.

Q. Did you carry out the orders under the instructions you had received?

A. Yes, sir.

Q. Did you see any of the cargo of the "Appam" being taken off her at any time after she was captured, and if so, what was it?

A. Yes, sir, I saw boxes of specie taken away from the "Appam."

Q. What kind of specie was that?

A. That was specie that we took on board on the West Coast of Africa, gold specie.

Q. Where had it been carried?

A. In the specie room.

Q. State what you saw in connection with the removal of that specie, and when?

A. On Saturday night, about ten o'clock, I was walking along the starboard side of the saloon deck, when I met with the senior German officer in charge, who asked me if I had any bags that I could lend him. I said no. I had no bags that I could lend him, but probably the second officer would have some. He asked me where the second officer was. I said I did not know—probably in his room. He then left me. I suppose he went to see the second officer. Later on I was standing near the alley-way when I saw somebody forward at the specie room. I noticed a flash light, and I went there to see what they were doing.

86 I was standing in the dark and I saw them bringing the boxes of specie from the specie room. There was a boat from the raider alongside. Some of the Germans had come on board. They carried the specie over to the port side and lowered it over the side into the German boat. From there they took it across to the raider.

Q. Do you know how many boxes of this gold specie there were?

A. I do not know how many.

Q. More than one?

A. Oh, yes.

Q. Quite a number?

A. Yes.

Q. Will you tell us whether or not the ship had a fresh water distiller, or not, and if so what its capacity?

A. Yes, we had a fresh water distiller—capacity thirty-five hundred gallons in twenty-four hours.

Q. Had it been used on the ship while you were on it?

A. Yes, while carrying troops.

Q. Are you a member of the English Naval Reserve?

A. No.

Q. How long has it been since those troops were carried?

A. We carried troops about twelve months ago.

87 Q. Had your ship been trading as part of the English Admiralty, or as an ordinary merchantman, prior to the capture, and if so, for how long a while?

A. She was trading as an ordinary merchantman on Voyage No. 13.

Q. How much prior to that voyage had she been?

A. Several voyages.

Q. Several voyages?

A. Yes. When I said she carried troops twelve months ago, I should have said twelve months previous to our capture on the 15th of January.

Q. Can you tell us about how many men you had in your engine department?

A. Seven engineers, one electrician, six oilers, fourteen fir-men, seven trimmers, thirty-five all told.

Q. I have asked you about the supply of coal at the time she was captured. Can you state what the supply of water she had?

A. We had plenty of water. We would have had a good surplus on arriving at Liverpool.

Q. Do you know anything about the other stores so far as your department is concerned, how well supplied you were in that regard?

A. Yes, we would have had a good surplus of everything on arrival at Liverpool.

Q. How about your other supplies in your department upon your arrival here?

88 A. We were short of supplies on arrival at Hampton Roads.

Q. The voyage to Hampton Roads was practically double the length of that to Liverpool?

A. Yes, sir.

Q. In replying to the inquiry as to the requirement of coal on your ship, you stated that under ordinary full speed it required sixty-five tons a day?

A. Yes, sir.

Q. You were captured on the 15th, and got under way on the night of the 17th, as I understand?

A. No, we were steaming on Saturday night and Sunday morning.

Q. But after Monday night you steamed without stopping at all, didn't you, not always at the same speed?

A. No, various speeds.

Q. You did not stop and have any boat communication with the "Moewe" after Monday night?

A. Not after Monday night.

Q. You arrived at Hampton Roads on the first of February?

A. Yes, sir.

89 Q. How do you account for the fact that you started with only five hundred and sixty tons of coal on the 15th of January, and arrived at Hampton Roads with sixty tons left?

A. Because I was going at slow speed.

Q. You were not going at ordinary full speed?

A. No, sir. The average consumption from the time of our capture until the time of our arrival was about thirty tons a day due to the fact of going under slow speed.

Q. How much did you use, approximately, coming across?

A. About thirty tons a day.

Q. You were not confined below deck until the night before you arrived at Hampton Roads?

A. No.

Q. Did you observe, during the voyage from the place of capture up to the time that you were sent below at nine o'clock, but not prior to the arrival at Hampton Roads, whether the lights of the "Appam" were showing or obscured?

A. The lights were obscured all the way across, but on the night before arriving in Hampton Roads no one was allowed to smoke on deck or strike matches on the deck. Previous to that they had been.

By the Court: You mean you came in without the ordinary running lights?

90 A. The navigation lights were burning, but all the lights about the ship with the exception of those were obscured. And the power of the navigation lights was reduced. Instead of 32-candle lamps in the globe, we had much less. I think there was only about ten candle power in the navigation lights, and the rest were all obscured—all the deck and cabin lights upon the deck were obscured.

By Mr. Floyd Hughes:

Q. Your fresh water distiller was in good condition after the capture?

A. Yes, sir, perfect.

Q. And up to the time you left the ship at Hampton Roads.

A. Yes.

**Cross-examination.**

By Mr. Robert M. Hughes:

Q. Will you please look at that paper and see if you know what it is.

By Mr. Floyd Hughes: Let us look at it first, please.

A. That paper was a sheet prepared by the second engineer.

Q. Do you know anything about it? Was it made out with your knowledge and consent?

A. That is the repair sheet that the second engineer makes out and submits to me, and then I decide what I shall put on my repair sheet. It does not follow because the second engineer puts  
91 them down that they are going to be done. In any case I am to decide whether they shall or shall not be done, and that they are fit to run two or three months on a voyage, as the case may be.

Q. These are repairs recommended to you by the second engineer for voyage 14, on the steamer "Appam"?

A. Yes. For the next voyage.

Q. And of course, you reserve to yourself the right—

Mr. Floyd Hughes: Objected to as immaterial, incompetent and irrelevant.

By the Court: There never was Voyage 14, and never will be probably.

By Mr. Robert Hughes:

Q. These, as I understand, were repairs that the second engineer recommended to be made on arrival at Liverpool at the end of the voyage on which they were captured. Am I right about that, Chief?

A. Yes.

By the Court:

Q. Did you ever pass, yourself, on that?

A. I did not pass that.

Q. How did you get that paper, Mr. Robert Hughes?

A. It came from the ship.

92 By Mr. Robert Hughes:

Q. It is headed: "Repairs Voyage 14, Engine Room" and then there is a list of repairs recommended for the engine room and other parts?

A. Yes.

By the Court: You found it on board the ship?

Mr. Robert Hughes: Yes. I am introducing the sheet from their own memorandum of what repairs or overhauling or whatever you choose to call it the second engineer of this ship thought necessary and recommended to his chief.

By the Court: This officer says he never approved it, that it never

went any further, but I suppose you can put it in for what it is worth.

By Mr. Floyd Hughes: We object as before.

Q. This paper, I understand, was made out just before you left Africa on the voyage on which you were captured, or was it after you left?

A. That was made after we left.

Q. Between the time you left Africa, bound for Liverpool, and the time of capture?

A. Yes.

93 Q. And the contemplated repairs, if you approved of them, were to be made at arrival at your destination Liverpool?

A. Yes.

Q. You say you have never approved these repairs?

A. No.

Q. Don't you think the port engine H. P. piston junk needs to be made easy?

By the Court:

Q. Is the man who made the paper here?

By Mr. Robert Hughes:

A. No, sir, I think not.

By the Court:

Q. You are putting in a paper made by him, and this officer identifies it. Is not that as far as you can go?

By Mr. Robert Hughes:

A. All right, he said he had not approved it, and I wanted to ask him on cross examination if certain of these things mentioned were not things which, in the nature of things, he would approve.

Q. Do you think that Horse power piston and junk rings ought to be made easy?

A. It would not interfere with the working of the engine in the slightest. Probably it would not have been done.

94 Q. As I understand, you had four boilers?

A. Yes.

Q. What was the minimum force of engineers, leaving out for a moment the trimmers and firemen and all that, that could run that ship and run those four boilers for a continuous voyage under ordinary speed, say two weeks?

A. The force that I had, eight.

Q. That allows for only one relief for each boiler—is that the way you work them, eight engineers and four boilers?

A. The engineers looked after the engines as well as the boilers.

Q. Of course. How about the firemen? What is the minimum number of firemen you could run four boilers with, for a voyage of two weeks?

A. The firemen that I had, fourteen.



Q. You spoke of some Germans whom you say were prisoners. Were they confined on the "Appam," or how were they guarded?

A. I do not know that they were guarded.

Q. What was the difference between the Germans and the other passengers?

A. The civilian prisoners were in the second class, and the military prisoners were in the third class.

Q. What precautions were taken as to their custody from 95 the time you left Africa up to the time of capture?

A. With the civilian class, none that I know of. As to the Military class, I do not know.

Q. You do not know what precautions were taken on the "Appam" as to these Germans. How many were there in all?

A. Twenty-one. I am not sure of the exact number.

Q. And some of them were women?

A. Yes, sir.

Q. Eighteen or nineteen men?

A. Yes, sir, the civilians would be that, I should think.

Q. You spoke about some boxes which you saw transferred, did you see the inside of those boxes?

A. No.

Q. You do not know certainly what was in them?

A. No, I saw them put on board, and saw them put in the specie room. It is only specie that we put in there.

Q. How do you know whether it was silver or gold?

A. I do not know, only what I was told. As a rule, it is only gold we bring from Africa in boxes of that class.

Q. Did I understand you to say in your examination, Chief, that you did not agree with the surveyor who recommended that the stern gland of the port tail end shaft should be repacked?

A. I do not agree with him, no.

96 Q. How long is a voyage from the Sierra Leone to Liverpool?

A. Nine or ten days.

Q. At ordinary speed?

A. Yes. Say ten days.

Q. What was your coal consumption at your ordinary speed?

A. About sixty-five tons.

Q. You mean that for ordinary speed?

A. Yes.

Q. What are your revolutions at ordinary speed?

A. About seventy-two.

Q. She is a twin screw steamer.

A. Yes, sir.

Q. You spoke about what you called bombs; you say you saw some of them; what did they look like; what was their character?

A. I cannot tell you what they look like. There was one with a conical end, the one at the bridge, and the other one was put in a box, one on the injector valve in the engine room.

Q. Were they round iron spheres?

A. The one on the bridge was, yes, and the others more square.

Q. You do not know personally whether they were actually loaded or not?

A. I do not know, but I do not think they would put them there if they were not. I would not like to try them anyhow.

Q. After you left Monday night, you say you came along steadily, after the Monday night succeeding the capture, you came along steadily at slow speed?

A. Various speeds, yes.

Q. I thought you said the balance of the voyage you came along at various low speeds?

A. Various revolutions.

Q. Was your daily average about the same from day to day—did the average vary considerably, or not?

A. No.

Q. You say your navigation lights were reduced, but not entirely extinguished until you got in here to America. The last night you came in, were your navigation lights entirely out, or not—the night you were told not to smoke or have lights on deck?

A. So far as I know, they were not. I do not know whether they were in or out, the navigation lights.

#### Redirect examination.

By Mr. Floyd Hughes:

Q. That is the night you were below deck?

A. Yes, sir, shut up at nine o'clock.

Q. What is the ordinary custom, at the end of a voyage of your line, in regard to repairs?

88 A. I submit a repair list to the superintendent of engineers.

Q. How do you get that list first?

A. From the second engineer.

Q. Then what do you do with it?

A. I strike out what I think is not required to be done.

Q. And then you pass that on?

A. Yes. To the superintendent of engineers. And very often he strikes out what he does not think needs doing. He is stationed in Liverpool.

Q. And after the repairs are recommended by the second engineer, they must then be approved by you and the superintendent of engineers at Liverpool?

A. Yes, sir.

Q. What is the general character of repairs in your department on that paper?

A. Only ordinary wear and tear.

Q. Anything there going to the seaworthiness or unseaworthiness of the vessel?

A. No, nothing.

## Recross-examination.

By Mr. Robert Hughes:

Q. You say that list when it comes through the second engineer, you strike out such things as you decide on. You also add things if you think proper?

99 A. Yes, sir.

Q. As a matter of fact, didn't you add the last item under this list, under the head of Engine Room? You notice that is in a different handwriting and ink from the balance.

A. Yes, I believe I did.

By the Court: Do you know the name of the officer with the boarding party that you had your first interview with?

A. No, sir.

Q. Was he an officer?

A. Yes, sir.

Q. From the "Moewe"?

A. Yes, sir.

Q. Did you know where you were going after you commenced to serve under Lieutenant Berg?

A. No, sir.

Q. When did you first learn that you were coming to these waters, or waters in this location?

A. I knew about six hours before arriving here.

## EXHIBIT WITH TESTIMONY OF G. P. ASHBURNER.

## Repairs. Voy. 14.

## Engine Room.

Port engine H. P. Piston junk ring to be made easy.

I. P. 1 & I. P. 2 piston valves on both engines to examine.

Port H. P. crank pin to examine (Mark).

Both air pump valves to examine & clean.

100 New distance piece for H. P. crosshead (to pattern).

Two bilge pump pet cock pipes to repair.

New pet cock for port bilge pump.

No. 5 tank to be cleaned out.

Ash pump stop valve to grind in.

Rever. engine " " " " "

16 Brass studs for Lamont pump to sketch.

2 spare piston rings for main boiler feed pump.

## Stokehold.

All boilers to be thoroughly scaled, tubes swept, backends cleaned out & uptakes swept.

Baffle plates, firebars & bridge bars to renew where required.

Butt straps on ford. & centre boilers to caulk & bagging repaired.

Whistle drain pipe to repair.

Two ash ejector pressure gauges to repair.  
 Air casings to be made tight.  
 Two new drain pipes for ford. boiler water columns.  
 Two segments for ash ejector bends.  
 All boiler mountings to overhaul.  
 Firing tools to repair.  
 New glasses to be fitted in Ford. & stand. boiler pressure gauges.

101

## Refrig.

New end to wield on piston rod.  
 Compressor rod to buff up & 2 new distance rings to pattern.  
 New drain cock for ford. brine pump.  
 Two gas bottle clips (Hangers).

## Electric.

Drain trap valve to grind in or renew.  
 New nut for oil pipe on No. 1 dynamo.  
 Two ammeters to repair.  
 2nd class smokers room, 3rd class pantry & steering gear fuse boxes to repair.  
 Locks to be fitted to boxes in 1st class smoke room, lounge & saloon,  
 2nd class smoke room & saloon.

## Deck.

No. 3 winch (port) clutch lever to repair.  
 New exhaust valve cover to drying room.  
 Ford. stand, rice boiler, new gland nut required.

## Culinary Department.

New plates to be fitted in potato peeler.  
 Sign to repair outside gentlemen's lavatory B. deck.

HENRY GEORGE HARRISON, another witness for the libellant, being duly sworn, testified as follows, examined by Mr. Floyd Hughes.

By Mr. Floyd Hughes:

Q. What is your age?

A. Sixty-four.

102 Q. What is your occupation?

A. Master of the "Appam."

Q. How long have you been following the sea?

A. Forty-nine years.

Q. And what certificate do you hold?

A. Master's certificate.

Q. How long have you held it?

A. Since 1876.

Q. How long have you been in the employment of the libellant in this case?

A. Thirty-six years.

Q. Had various commands with that company?

A. Yes.

Q. When did you first come in contact with the Steamship "Appam" and under what circumstances did you go down to see her?

A. I joined her in Belfast three years ago last February. She was a brand new ship, just completed then.

Q. How did you happen to go down?

A. I was ordered to go by my directors?

Q. Who are your directors?

A. The owners of the English Steamship "Appam," belonging to the English company known as the British and African Steam Navigation Company, Limited.

By Mr. Robert Hughes: We object to this kind of proof.

103 Q. And you went down in their behalf prepared to take command?

A. Yes, sir.

Q. And how long were you there before she went into commission?

A. A fortnight.

Q. Did you stand by her from that time on?

A. Yes, to Liverpool.

Q. And you have been her master ever since that time?

A. Yes, sir, ever since.

Q. What was the condition of the "Appam" with respect to seaworthiness or unseaworthiness at the time she started on her thirteenth voyage from Liverpool?

A. She was in first-class order.

Q. How was she in that respect when she was captured?

A. First class order.

Q. And how was she in that respect when she arrived at Hampton Roads?

A. In the same condition.

Q. What kind of a cargo did you take on at West Africa?

A. General African produce.

Q. And did you take on any passengers?

A. Yes.

Q. About how many?

A. About one hundred and sixty, all told.

104 Q. Were any of those Germans?

A. Yes, I think about twenty-two Germans.

Q. How many women?

A. Three.

Q. Were there any military prisoners, and if so how were they dressed?

A. Yes, military prisoners, dressed in Khaki uniform.

Q. And how were the civilian men dressed?

A. In ordinary costume.

Q. Captain, coming down to the capture, please state what hap



pened to your ship after the "Moewe" came in sight as half past two in the afternoon.

A. At half-past two in the afternoon, I was talking to my officer, and said that there was a steamer approaching and giving the signal for stopping instantly. I had her stopped at once. It looked like an ordinary cargo boat, but she had a German flag flying. I told the wireless operator not to touch the instrument, and as soon as I gave the message she fired a shell across my bow, came around my stern, and shot another shot over my stern. The engines were stopped. I said to my officers: "On no account let anyone touch that gun we have on board," because I saw large guns on the pirate pointed at us. We waited a few minutes and a boat was lowered, and she came alongside with an armed crew. They came on board, and they had several buckets with peculiar looking things in them, some  
105 round. A man whom I took to be an officer came up on the bridge. He said to me: "Captain, I am very sorry, but I have got to take your ship from you." I said, "So am I." He put a man on the bridge and signaled across to the ship, which was lying in the three or four hundred feet off. He wanted to know what my cargo was, how many passengers, how much coal, and if I had any specie. I called the chief engineer and the purser, and gave him the particulars, which he signaled across to the other ship. He then said a message has come that you and all your crew have got to come aboard the other ship. He said, "You can get your things and take them with you." I had nothing more to do with the ship then. As soon as my things were packed up, I was taken on board the other fellow. When I got on board, I was told to go on board and interview the captain, and the first thing he said to me was: "You are a very lucky man, I would have fired at you if you had attempted to escape. I would have sunk you." I said, "What are you going to do with my ship, sink her?" And he said, "I will wait until tomorrow, and think about her." He asked how much coal I had her speed, also how many passengers, and he told me to go forward with the sailor; and that is all I saw.

Q. Where did you go then?

A. We came forward, between decks.

Q. Were there any other people down there?

A. Yes, sir, full of black and white men.

Q. What became of the people who went off the "Appam" with you?

108 A. They were all hustled off in the same place

Q. How many of the "Appam" went off with you?

A. Eighteen of the crew.

Q. Including your deck officer, all the crew except your second officer?

A. Yes, sir.

Q. What became of the engineer force?

A. They were told to remain on board the ship.

Q. Were any bombs placed on board your ship before you left the "Appam"?

A. I only saw two buckets full of these machines being brought on board.

Q. What became of them?

A. I do not know.

Q. And you stayed on the "Moewe" how long?

A. I stayed on board that ship two days.

Q. Were you allowed up on deck at any time?

A. Yes, sir, once in the morning, and once in the afternoon.

Q. When did you first see Lieutenant Berg, and where?

A. I spoke with him on Monday morning.

Q. Where was he then?

A. On board the raider.

Q. When did you next see him?

A. Next time I saw him on board my own ship.

Q. Who was in charge of your ship when you arrived back on board of her Monday afternoon?

107 A. Mr. Berg.

Q. Did he remain in charge of the "Appam" from that time until you arrived at Hampton Roads?

A. He did.

Q. What men did you observe on board the "Appam" as well as your officers and crew when you returned?

A. When I got back I found the German passengers all armed.

Q. Did that include the civilians as well as the military men?

A. Yes, sir, all of them except the women. I spoke to one or two of them. They had white bands on their arms which had the words, "Dutch Landstrum."

Q. Did they perform that guard duty?

A. All the voyage.

Q. How about the military prisoners, the khaki?

A. They kept watch and watch too, and guard.

Q. How was the prize crew dressed?

A. They were dressed in uniforms, naval uniforms.

Q. Did you see any in officers' uniforms other than Lieutenant Berg?

A. I did not. I do not understand much about uniforms. They were all in the naval uniform.

Q. Now, some others were brought over from the "Moewe" Monday afternoon, too, were they not?

A. Yes.

Q. How many?

108 A. The crews of six sunken steamers in addition to my own.

Q. Do you remember how many they were in number?

A. No, I do not.

Q. Do you know how many more souls were on board the "Appam" after you returned on Monday afternoon, as compared with the number before she was captured?

A. Over one hundred.

Q. Did you have any talk with Mr. Berg at any time, upon your return to the "Appam" or prior thereto with reference to the cargo? Or your coal? Or your stores?

A. Only on board the raider.

Q. You saw him on board the raider?

A. Yes, sir, on Monday morning. He asked me if I had got any metal on board. I said "I do not think so," but when he was leaving, going over the side into the boat to return, I went up to him and said, "I think there is about half a ton of condemned stores from Sierra Leone." He said, "I suppose you mean between seventy and eighty tons." I said, "No, you will see it on the manifest when you get on board."

Q. Did you have any other interview with him after you were received on the "Appam"?

A. When I went on board, after my crew had been counted up, mustered up, I was asked to go on the bridge, and Mr. Berg was there, and he pointed to a large thing standing on the deck and said "That is a bomb." He said, "I suppose the captain of the raider spoke to you." I said "Yes." He said, "That is a bomb.

109 If there is any trouble, mutiny, or attempt to take the ship, I have my orders to blow up the ship instantly." He said "There are others about the ship. I do not want to use it, but I shall be compelled to if there is any trouble."

Q. Did he have anything to say about anything happening, what would be done with the people on board, whether they would be given time to get off or not?

A. That was during the passage. I asked him if he met an English cruiser what would be done. He said, if possible he would give us ten minutes to get into all the boats, but if she attempted a capture, we would all be blown up.

Q. What quarters were offered you, and what quarters did you occupy after you got on the "Appam"?

A. I had a state-room down below, a passenger's state-room.

Q. What part did your deck force take, if any, in connection with the ship after you returned to her?

A. My engine room force were running the ship, and my deck department kept the ship clean.

Q. Did you observe conditions in the engine room in respect to whether they had any bombs placed down there, or whether they were under guard?

A. There was a guard down there all the time.

Q. What bombs did you see there?

A. I saw one on the bridge.

110 Q. How about the chart room?

A. I did not go in the chart room.

Q. Now, as to the guard, where did you say they were stationed?

A. All about the deck. Different parts of the ship.

Q. Who performed that guard duty?

A. The sailors and the soldiers and the German passengers, civilian German passengers.

Q. Those people you described with the armulet on?

A. Yes, sir. They all stood guard at different times and they were all armed.

Q. What became of you the night before your arrived at Hampton Roads?

A. I was down in the cabin.

Q. Were you let on deck?

A. Not at night.

Q. When was the last time you saw these Germans that had been on your ship before the capture prior to your arrival at Hampton Roads?

A. They were all armed the day before we arrived there?

Q. They were standing there up to that time?

A. The day before we arrived.

Q. Did you see them before you arrived at Hampton Roads? that morning?

A. I was on deck when we arrived at Hampton Roads.

Q. Did you see them then?

A. Yes.

111 Q. How were they in respect to this armulet?

A. They had no arma.

Q. How about the armulet?

A. They had taken them off.

Q. In taking on a cargo of this nature, from West Africa, what is necessary to be done in respect to the hatches on board the ship in order to keep the cargo in condition?

A. The hatches were kept open as much as possible.

Q. How about the hatches of No. 4 hold?

A. Those hatches could not be taken off because No. 4 hold there are passengers down there, and tables spread on top of the hatch.

Q. That cargo in No. 4 hold, and the hatches on from the time you left West Africa up to the time you arrived at Hampton Roads, and with those hatches still remaining closed up to the 10th of April, what would have happened in respect to the cargo?

A. The cargo would sweat.

Q. What would that sweating produce in the way of water?

A. In that hold very little. It would sink down to the bottom of the hold, and wet some of the cargo.

Q. How much water do you calculate that would make in the length of time specified?

A. Well, it would all depend. If the cargo was liable to damage, it would spread a few inches.

Q. Would that affect the seaworthiness or unseaworthiness of the vessel?

112 A. Not in the slightest.

Q. And as I understand, in your judgment it was entirely seaworthy at the time she arrived in Hampton Roads?

A. Quite.

#### Cross-examination.

By Mr. Robert Hughes:

Q. Were you correctly reported in the public print as saying you had no complaint to make of your treatment by Lieutenant Berg on your voyage?

A. I have no complaint to make.

By Mr. Floyd Hughes:

Q. One question—are you in the British Naval Reserve?

A. No.

Q. Were any of your officers or crew, so far as you know?

A. I do not know.

By Mr. Robert Hughes:

Q. Did I understand from one of your other men that you shipped the gun when you started from Africa, a three-inch gun?

A. Yes.

Q. Did you put on a gun's crew, too?

A. We got two men on board with the gun.

Q. Where did they come from?

A. From Dakar?

113 Q. Were they civilians?

A. Sailors.

Q. Merchant sailors?

A. I suppose so.

Q. Not Navy men?

A. I could not tell you; they were sent on board with the guns.

Q. What kind of clothes did they wear?

A. The same as my quartermaster.

Q. Is that a uniform?

A. Yes, sir.

Q. What kind of hat or cap?

A. A sort of sailor's cap.

Q. Anything on the cap?

A. No, sir.

Q. Who sent them aboard?

A. I was told to call in for them, and they were sent on board by the Agent with the guns.

Q. They came with the gun?

A. Yes, sir.

Q. They seemed to know what they were about?

A. I never spoke to them.

Q. Where did you call for them?

A. Dakar.

Q. Whereabouts, at the wharf, or where?

A. I do not know.

114 Q. On the way up, from the time you left Dakar, until the capture, did they leave the gun on the stern without using it, or occasionally try their hand at a mark?

A. The gun was covered over.

Q. Didn't they practice with it?

A. Not to my recollection.

Q. As a matter of fact, didn't they practice with that gun the day before you were captured?

A. Not to my recollection.

Q. You didn't see any shots from it?

A. No, sir.



Q. About these Germans you had on board, where were they put on board?

A. Some came on at Akbar, and some at Locust.

Q. Did they come voluntarily, or under guard?

A. Under guard, came on an ordinary cargo boat, that they bring passengers on.

Q. Were not some of them prisoners?

A. I presume they were prisoners.

Q. What did you do with them when you got them on board?

A. Put them in their cabins.

Q. Have any special cabin for them?

A. No, not especial.

Q. Were they put under confinement on board?

A. No, except they were not allowed to go out. The  
115 soldiers were put in the third class and the passengers in the second class.

Q. Were not they confined under lock and key?

A. No.

Q. I do not mean separately, in every separate compartment, but were they not under some species of restraint that was not common to the balance of the people down there?

A. No, they were not locked up.

Q. What do you mean by speaking of them as prisoners—if they were prisoners what made them prisoners?

A. I suppose they were prisoners for the English Government, sent aboard as passengers and to be taken to England, I think.

Q. And yet all those prisoners were not under guard and not under restraint on your ship?

A. We put no guard over them.

Q. What kind of a ship was it they came in?

A. An ordinary surf boat.

Q. Can not you go up to the wharf?

A. No, there is no wharf, they come up in surf boats.

Q. Where were you when they came on board?

A. On board the ship.

Q. Did you receive any special orders about them?

A. No.

Q. Did you know when they came on board, they were coming?

A. I was told the passengers were coming as government passengers.

116 Q. You knew they were Germans?

A. Yes.

Q. What do you mean by Germans in time of war being Government passengers?

A. The government was looking after them.

By the Court:

Q. Haven't we lost enough time over that. They were German prisoners, who were going to England to be interned.

By Mr. Robert Hughes:

Q. In point of fact, was not your steamer at that time in use by the British Admiralty?

A. No.

Q. Did the purser collect any tickets from those men or their passage money?

A. The passage money was sent by the government. The tickets would be sent by the government and collected through the agent.

Q. In reference to these armulets that the men wore, was not that a mere means of identifying them? You had then about five hundred men on board the ship at that time after you took the men of the captured ships from the raider?

A. Yes.

Q. Was not that armulet they wore a mere means of distinguishing them in the crowd?

A. I saw they were German soldiers.

Q. It was for the purpose of showing that they were German soldiers?

A. Yes, sir.

117 Q. That was a means of distinguishing them as German soldiers, was it not?

A. Yes.

Q. I understand you were not allowed on deck just before you came into Hampton Roads?

A. Not allowed on deck the night before.

Q. How about on the voyage, before you approached this side?

A. Generally allowed on deck until about nine o'clock.

Q. The ordinary cabin and other lights of the ship during the whole voyage was kept obscured?

A. Yes, sir, all the lights were kept obscured except the running lights.

Q. Captain, where did you place the point of capture, latitude and longitude?

A. Latitude 33.19; longitude 14.24 west.

Q. In case the vessel had military reasons, during the time of war, for not going from the point of capture to, we will say Emden, in Germany, what would be the safest course for her to take, a general course, I do not mean day by day?

A. I do not know.

Q. Under those circumstances, would not you go around by the north of Scotland?

A. I cannot say what I should do.

Q. You do not know what you would do if you were in command of a ship during time of war, and the English channel was mined and closely guarded by hostile vessels?

118 A. I should have to be guided by circumstances.

Q. One circumstance would be to keep away from that neighborhood, if it was mined and hostile cruisers along there?

A. I cannot say what I would do.

Q. Suppose it should be decided by the man who could say what he should do that the safest course from that point, which is in

the general vicinity of the Madeira Islands, was around the west of England and then around the Shetland Islands and so along the European coast into Germany. Can you give me any idea what the length of that coast would be in miles?

A. No.

Q. Have you ever navigated in that part of the world?

A. No.

Q. Ever navigated in the North Atlantic?

A. No.

Q. I suppose you know the condition of the weather in the North Atlantic during January and February?

A. Yes.

Q. Not quite as good as the course from Madeira Islands to Hampton Roads?

A. No.

Q. A good many icebergs at that time?

A. So they say.

Q. Had your vessel ever been aground on that voyage at all?

A. The ship touched one or two of the bars in one or two  
119 muddy streams.

Q. Any considerable length of time?

A. Not over twenty-four hours, but that us a regular thing on the coast. We have got to go through the shallow creeks on all African voyages.

Q. It is not especially good for a vessel to go over?

A. It does not injure them in the slightest.

#### Redirect examination.

By Mr. Floyd Hughes:

Q. Did you have any more touching of bars, or grounding in the muddy creeks on this voyage than on other ordinary voyages on the West African Coast?

A. No.

Q. And that has been your experience on that coast for a good many years?

A. Thirty-six years.

Q. I suppose from your information, there are no more mines or English cruisers in the British Channel than in the North Sea on the northern approach to Emden?

A. No more what?

Q. No more mines or British cruisers on the northern approach to Emden than the southern approach?

A. As far as I know, no.

120 Q. You have been asked whether the "Appam" was in the service of the British Admiralty at the time of its capture on this voyage. In whose service was she?

A. She was in the service of the British and African Steam Navigation Company.

Q. And used in what capacity?

A. As a cargo and passenger steamer.

Q. As an ordinary merchant ship?

A. As an ordinary merchant ship.

Recross-examination.

By Mr. Robert Hughes:

Q. You do not mean to say that mines are as thick in the North Sea as in the English Channel?

A. I do not know anything about that. I have not been up there.

121 May 13, 1906, at 10.30 o'clock a. m.

Mr. HARRISON recalled; examined.

By Mr. Hughes:

Q. I forgot to ask you about what first transpired when you went on board the raider? Did you go on board?

A. Yes, sir.

Q. Did you see the commander?

A. I did.

Q. Who was he?

A. I do not know his name.

Q. Don't you know the name of the commander?

A. I was told to go up and see the commander.

Q. Haven't you ever heard what his name is?

A. I have heard it since.

Q. What is it.

A. Dohna.

Q. Dohna?

A. I think so.

By the Court:

Q. You did not know his name at the time of the capture?

A. No, sir.

Q. You have heard it since.

122 A. I have heard since that that was his name.

Q. How did you hear it, Captain?

A. I think I saw his name in the papers.

Q. Is that the only way in which you have heard what his name was?

A. Yes, I think that is the only way.

Q. Did you hear it mentioned at all while you were on the raider?

A. No.

Q. Did you see any papers of any sort on the raider? which showed who he was, or what he was?

A. No.

By the Court: So far as he thinks what his name was, it has to be stricken out.

By Mr. Symmers:

Q. Did you notice the number of people on board the raider?

A. I did not count them. I noticed there were a number of people on board.

Q. Would you say she was pretty well filled up, counting passengers and prisoners and crew?

A. She had a lot of prisoners and a lot of her own crew.

Q. Did you notice the name of the vessel called the raider?

A. When I was in the chart room, the captain sent for all of us captured masters before we left the ship, and I saw on the porch of the chart room a plan and dimensions of the ship, and the name "Pongo".

123 By Mr. Robert Hughes: We object to the last testimony as irrelevant.

A. I say it was the S. S. Pongo.

By the Court:

Q. Did that refer to the ship you were on?

A. That referred to the raider.

By Mr. Robert Hughes:

Q. All you saw was this thing hanging up in the chart room in a frame?

A. Frame form like every steamship carries in the chart room.

By the Court:

Q. To what extent were you at liberty coming over in the ship? Could you go about where you wanted to, and see what was going on?

A. Yes, I was not allowed anywhere near the navigating places except by permission of the Captain.

Q. What I wanted to ask is. What flag did the "Appam" come over under?

A. She had no flag flying all the time until we got into Hampton Roads.

Q. You mean she came over without a flag until she reached Hampton Roads?

A. I did not see any flag flying.

Q. And what flag did she show after reaching Hampton Roads?

124 A. The German flag.

Q. Where was it put up?

A. When we got inside the harbor.

By Mr. Bullowa:

Q. Did you see the name plate on the raider?

A. No.

By Mr. Robert Hughes:

Q. It is not unusual, in time of war, for vessels while out on the ocean, to go without showing the flag, is it? Is that very common?

A. Yes, in fine weather.



Q. You did not have the British colors up when you were on the "Appam"? You had no flag at the time you were captured?

A. Yes, we did. We passed one or two steamers.

By Mr. Bullowa:

Q. Did you see the builders' number on the plate?

A. Yes, sir.

Q. Where was that?

A. On the front of the amidship house.

Q. Do you remember the number?

A. No. I remember the maker's name—Tecklenburg yard.

125 A. G. BAILEY another witness for the libellant, after being duly sworn, testified as follows:

By Mr. Floyd Hughes:

Q. What is your name and occupation, Mr. Bailey?

A. A. G. Bailey; coal-dealer.

Q. How long have you been in the coal business, and where?

A. Eleven years, Norfolk, Castner, Curran, Bullett.

Q. You are now the agent of Castner, Curran & Bullett?

A. Yes, sir.

Q. How long have you been such agent?

A. Since 1908.

Q. What experience have you had in the waters of Eastern Virginia, in the matter of furnishing coal and stores and provisions to vessels coming into port?

A. I frequently furnish vessels with coal in Hampton Roads and the harbor limits of Norfolk. I furnish supplies through outside contractors, such as provisions and water.

Q. You mean by that you have supplies furnished by other people, and if you see they want supplies, you purchase them through other people. You do not handle anything but coal?

A. No, those supplies are bought by the captain and settled for through my office.

Q. You were here on the 1st of February last, and know the general conditions as to provisions and coal at that time?

A. Yes.

125½ Q. How long, Mr. Bailey, would it have taken a steamship of the size of the "Appam", arriving in Hampton Roads on the 1st of February with sixty tons of coal, approximately, in her bunkers, to have provided herself either at Newport News, or at Sewell's Point, or in Norfolk, with sufficient coal, with ample margin, to make a voyage to the nearest German port?

A. I do not know that I know accurately the distance between Hampton Roads and the nearest German port.

By Mr. Robert Hughes: Objected to as irrelevant.

By Mr. Floyd Hughes: The relevancy is absolutely apparent. They say she was in an unseaworthy condition because short of coal.

and granting that to be the case, we want to show how long it would have taken her to supply herself.

Admitted.

A. Such a steamer could have been coaled at the rate of 6,800 tons a day.

Q. How long would it have taken a steamer such as the "Appam", of the burden of approximately 8,000 tons, and with five hundred souls, approximately, on board, to have furnished herself with sufficient provisions for a voyage to a port on the west coast of Europe?

A. I should say, for twenty-one days' supplies, basing it on a three-weeks' voyage, that she could have secured the necessary  
126 supplies certainly within thirty or forty-eight hours.

Mr. Robert Hughes: We object to this evidence as irrelevant.

Q. How about engine room supplies for vessels of that character? I have asked you about the coal and about the provisions with five hundred souls on board. Now, about the engine and other supplies, supposing that she was short?

A. I do not know of any reason that the necessary supplies for the engine room could not have been supplied within that time.

Q. How about water?

A. Water was available and could also have been supplied within a period of thirty hours.

#### Cross-examination.

By Mr. Robert Hughes:

Q. I do not understand that you have ever had any actual experience in loading ships. Your experience has been rather in the way of paying the bills after they were loaded. Has it not?

A. Yes, sir, and also the direction of the operation of loading. I have not actually performed the physical work, but I have directed the work to be done.

Q. You are speaking of the estimate you gave of the time it would have taken from the time she started until the time she finished, I suppose?

127 A. Yes, after the order was placed.

Q. And after the ship was placed?

A. Yes. After the order was placed, is the time I indicated.

Q. And after the ship was berthed, too, I suppose you mean. They could not have done that before berthing.

A. Yes, sir, it was not necessary to berth her; all that could be done in the stream.

Q. "The Appam" is a right large steamer, isn't she?

A. Yes.

Q. Could she have been coaled in the stream from barges without taking her to the pier?

A. She would likely have been coaled by barges from alongside.

Q. Not taken to the pier?

A. No, sir.

Q. You had no knowledge personally of what supplies she had, or what supplies she needed, had you?

A. Yes, I know what supplies are required, such as food and things like that.

Q. You mean she would have acquired practically a complete outfit.

A. I have knowledge of the supplies she would require for a voyage of one week, or twenty-one days, by the British Board of Trade Regulations.

Q. You mean, assuming that she had none on board at all?

128 A. Yes.

Q. And your estimate is given on the assumption that that was so?

A. That she was absolutely without supplies.

Q. Was this a fact?

A. I am not familiar with that condition.

By Mr. Coudert:

Q. Do you know the vessel?

A. I have never been aboard, but I have seen her frequently.

Q. And in making your answers you referred to the "Appam".

A. The "Appam".

The Libellant then offered proof that it was a corporation duly organized under the laws of the Kingdom of Great Britain and Ireland, and was the owner of the Steamship "Appam", which facts were admitted by the respondents in the stipulation of Proctors as to the record on appeal (post, folio 192).

129 *Answers to Interrogatories in the Case of Henry G. Harrison, Master, vs. Cargo of Steamship "Appam."*

Introduced by the Libellant.

(Extract from the Stenographer's Transcript of the Evidence.)

We offer now as an admission of the respondent in this case, the second interrogatory, letter "A" (Said second interrogatory, Letter "A," being as follows: State the position by latitude and longitude of the steamship Appam when she was captured) of the answers to the interrogatories, sworn to by the same respondent in the cargo case, in answer to the interrogatories; that is: in the second interrogatory, letter "A," it is stated: Latitude 35.05 North, Longitude 14.20 West, as far as I can remember."

(Respondents state that the answer of Lieutenant Berg to the second interrogatory should have been Latitude 33.05 N. instead of 35.05. It is agreed that the answer may be amended accordingly, if desired) and the answer to the 5th interrogatory, letter "A," (Said 5th interrogatory, letter "A," being as follows: On the arrival of the Appam at Hampton Roads did you deliver any papers and/or

documents to any one?) in the following language: "I gave to Mr. Hamilton, the Collector of Customs, a copy of my authority from the commander of the "Moewe," which is in the following words, and then follows the German text.

(Translation.)

"Information for the American Authorities.

The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer "Appam," and has orders to bring this ship into the nearest American harbor, and there to lay up.

Kommando S. M. H. Moewe—

COUNT ZU DOHNA,  
Cruiser, Captain & Commander.

(Imperial Navy Stamp:) Kommando S. M. H. Moewe.

129½

*Ausweis.*

Für Die Amerikanischen Behörden.

Vorzeiger dieses, der Leutnant zur See d. Res. Berg, ist von mir zum Kommandanten des aufgebrachtten englischen Dampfers "Appam" ernannt worden und hat Befehl, das Schiff in den nächsten amerikanischen Hafen zu bringen, und dort aufzulegen.

Kommando S. M. H. Möwe—

GRAF ZU DOHNA,  
Korvetten, Kapitän und Kommandant.

Kaiserliche Marine, Briefstempel: Kommando S. M. H. Möwe.

130

*Evidence for the Respondents.*

Commission of Count Dohna and Translation.

Introduced by Respondents and Filed May 13th, 1916.

Beglaubigte Abschrift.

Wir Wilhelm von Gottes Gnaden, Deutscher Kaiser, König von Preussen, etc., etc., tun kund und fügen hiermit zu wissen: Nachdem Wir resolviert haben den Kapitänleutnant Nikolaus Burggrafen und Grafen zu Dohna-Schlodien wegen sein treu geleisteten Dienste, guten Eigenschaften und erlangten See- und Kriegskentnisse zum Korvetten Kapitän zu ernennen und zu bestellen so tun Wir solches auch hiermit in Kraft dieses Patents dergestalt: das Uns und Unserm Allerhöchsten Hause, derselbe noch ferner getreu, hold und gehorsam sein, Unsere Nützen und Bestes überall suchen und befor-

dern, Schaden und Nachteil aber, nach ausserster Möglichkeit verhüten, warnen und abwenden, wa sihm als Korvetten Kapitän zu tun und zu verrichten obliegt, auch ihm von seinen Vorgesetzten nach Gelegenheit aufgetragen und aufbefohlen wird, mit gehöriger Treue, Fleiss und Eifer, bei Tag und bei Nacht, zu Wasser und zu Lande, ausführen und bewerkstelligen sich davon durch nichts abhalten lassen auch bei allen vorfallenden Kriegsbegebenheiten mit williger und ungescheueter Daransetzung seines Leibes und Lebens, Guts und Bluts, sich noch ferner dergestalt erhalten und bezeigen solle, wie es einem getreuen Diener und rechtscheffenen see- und kriegserfahrenen Korvetten Kapitän eignet und gebühret, derselben Eidespflicht es erfordert und Unser allergnädichstes Vertrauen desfalls zu ihm gerichtet ist.

Dagegen wollen Wir Unsern nunmehrigen Korvetten kapitän. Burggrafen und Grafen Dohna-Schlodien bei diesem Dienstgrade und allen demselben daher zustehenden Praerogativen und Gerechtsamen jederzeit in Gnaden schützen und maintainieren auch bei vorkommender Gelegenheit aufdesselben weitere Beförderung bedacht sein.

Das zu Urkund haben Wir dieses Patent Eigenhändig unter geschrieben und mit Unserm Insiegel bedrücken lassen. So geschehen und gegeben:

Berlin, Schloss den 7 Februar 1914.

131 [L. S.]

(Gez.)

WILHELM, I. R.

Für richtige Abschrift.

*Hofrat im Marine Kabinett Seiner  
Majestät des Kaisers und Königs.*

Beglaubigt. Berlin den 1 April 1916.

Das Auswärtige Amt Des Deutschen Reichs.

Im Auftrage:

KRIEGE.

EMBASSY OF THE  
UNITED STATES OF AMERICA, BERLIN.

Seen for the authentication of the foregoing Signature, this 2nd day of April 1916.

J. C. GREW,  
*Secretary of Embassy.*

Patent als Korvettenkapitän für den bisherigen Kapitänleutnant Burggrafen und Grafen zu Dohna-Schlödien.

132

*Translation.*

Certified Copy.

Know all men by these presents that we Wilhelm by the Grace of God German Empire, King of Prussia, etc., etc., etc. Having



resolved to nominate and appoint Lieutenant Commander Nikolaus Burggraf und Graf zu Dohna-Schlodien to be a Commander (Korvettenkapitaen) on account of the faithful services rendered by him, his good qualities, and acquired knowledge of matters of war and sea, we so do also hereby on the strength of this Commission in such manner that the same (he) shall also henceforward be faithful, loyal, and obedient to us and Our Sovereign House; everywhere seek and further Our advantage and best (interests); prevent, forewarn, and avert, however, to the utmost possibility harm and disadvantage; execute and effect with due faithfulness, diligence, and zeal by day and night, by sea and land, what is incumbent on him, as a Commander to do and perform, also what he is commanded and bidden to do at occasion by his superiors, not be deterred therefrom by anything; likewise in all events of war that may occur, willingly and fearlessly staking his body and life, property and blood, continue so to behave and prove himself, as is proper for and behooves a faithful servant and righteous Commander, experienced in matters of sea and war, whose oath binds him to act thus and to whom therefore Our most gracious confidence is directed.

In return we will at all times graciously protect and maintain Our present Commander Burggraf und Graf zu Dohna-  
133 Schlodien in this grade of service and all prerogatives and rights appertaining to him therefrom, likewise be mindful of his further promotion when occasion offers.

In testimony whereof we have signed this Commission with our Own Hand and caused it to be imprinted with Our Seal. So done and given:

Berlin, Castle, February 7th, 1914.

[L. s.]

(Signed)

WILHELM, I. R.

For correct copy.

[L. s.]

(Signed)

SZILLINSKY,

*Aulic Councillor in His Majesty the Emperor  
and King's Cabinet for Naval Affairs.*

Authenticated, Berlin, April 1st, 1916.

The Foreign Office of the German Empire.

By Order:

[L. s.]

(Signed)

KRIEGE.

Copy.

EMBASSY OF THE

UNITED STATES OF AMERICA, BERLIN.

Seen for authentication of the foregoing signature this 2nd day of April, 1916.

[L. s.]

(Signed)

J. C. GREW,

*Secretary of Embassy.*

Commission as commander (Korvettenkapitaen) for the former Lieutenant Commander Burggraf und Graf zu Dohna-Schlodien.

134 *Extract from Naval Register of Imperial German Navy and Translation.*

Introduced by Respondents and Filed May 13th, 1916.

Zu A IV 3279/16 19/3

*Beglaubigter Auszug.*

aus der letzten Rangliste der Kaiserlichen Deutschen Marine für das Jahr 1914. Nach dem Stande vom 12. Mai 1914. Auf Befehl Seiner Majestät des Kaisers und Königs. Redigiert im Marine-Kabinet-Berlin. Seite 127.

**Korvettenkapitäne.**

Dienstgrad, Namen, Orden und Ehren- zeichen.	Station.	Dienst- tritt.	Gesamt- Seed en- szeit.		Datum des Patents.	Dienst- verhalt- nis.
			J.	M.		
Korvettenkapitan Burggraf u. Gr. zu Dohna-Schlodien.	N	7.4.96	14	6	7.2.14	= Posen N-Offiz.

Die Richtigkeit des vorstehenden Auszug wird hiermit amtlich beglaubigt.

Der Staatssekretar des Reichs-Marine-Amts.

In Vertretung.

[SEAL.]

HEBBINGHAUS.

Beglaubigt. Berlin, den 1 April, 1916. Das Auswärtige Amt des Deutschen Reichs.

Im Auftrage:

[SEAL.]

KRIEGE.

EMBASSY OF THE  
UNITED STATES OF AMERICA, BERLIN.

Seen for authentication of the foregoing signature this 2nd day of April, 1916.

J. C. CREW,  
Secretary of Embassy.

135

*Translation.*

Ad A IV. 3279/16 of 19/3.  
Imperial Navy Office.

*Certified Extract*

from the latest rank-list (register of officers) of the Imperial German Navy for the year 1914. According to the records of May 12th, 1914. (Published) by order of His Majesty the Emperor and King. Edited in the Cabinet for Naval Affairs Berlin. Page 127.

*Commanders (Korvettenkapitaene).*

Grade, name, orders, and decorations.	Station.	Entry into service.	Total ser- vice at sea. Y. M.	Date of com- mis- sion.	Duty.
Commander Burggraf u. Gr. zu Dohna- Schlodien.	N	7.4.06	14 6	7.2.14	Posen, N. Officer.

The correctness of the foregoing extract is hereby officially cer-  
tified.

For the Secretary of State of Imperial Navy Office.

[L. s.]

(Signed)

HEBBINGHAUS.

Authenticated. Berlin, April 1st, 1916.

The Foreign Office of the German Empire.

By Order:

[L. s.]

(Signed)

KRIEGE.

Copy.

EMBASSY OF THE  
UNITED STATES OF AMERICA, BERLIN.

Seen for authentication of the foregoing signature this 2nd day  
of April, 1916.

[L. s.]

(Signed)

J. C. GREW,  
Secretary of Embassy.

136

*Commission of Lieutenant Hans Berg and Translation.*

Introduced by Respondents and Filed May 13th, 1916.

*Beglaubigte Abschrift.*

Nachdem Seine Majestät der Deutsche Kaiser und König von  
Preussen Unser allergnädigster Kriegsherr resolvirt haben, dem  
Vizesteuermann der Seewehr Hans Berg im Landwehrbezirk Flan-

burg zum Leutnant zur See der Seewehr II Aufgebots des Seeoffizierskorps in Gnaden zu ernennen und zu bestellen so thun Allerhöchst dieselben solches auch hiermit in Kraft dieses Patents dergestalt: dass Seiner Kaiserlichen und Königlichen Majestät und Dero Allerhöchstem Hause, derselbe zuvorderst getreu, hold und gehorsam sein, seiner charge gebührend wahrnehmen, was ihm zu thun und zu verrichten obliegt und aufgetragen wird, bei Tag und bei Nacht, zu Wasser and zu Lande fleissig und treulich ausrichten, bei allen vorfallenden Kriegs Gelegenheiten sich tapfer und unverweislich verhalten, wie es seiner Eidespflicht gemäss ist, übrigens aber auch alle mit dieser charge verbundenen Praerogative und Gerechtsame geniessen solle. Das zu Urkund haben allerhöchst dieselben dieses Patent mit Dero Insiegel bedrücken und autorisieren lassen.

So geschehen und gegeben: Grosses Hauptquartier, den 10ten August 1915 W.

[L. S.]

Für richtige Abschrift

[SEAL.]

*Hofrat im Marine Kabinett Seiner  
Majestät des Kaisers und Königs.*

Beglaubigt. Berlin den 1 April 1916.

Das Auswärtige Amt. Des Deutschen Reichs.

Im Auftrage:

[SEAL.]

KRIEGE.

EMBASSY OF THE  
UNITED STATES OF AMERICA, BERLIN.

Seen for authentication of the foregoing signature, this 2nd day of April, 1916.

[SEAL.]

J. S. GREW,  
Secretary of Embassy.

Patent als Leutnant zur See der Seewehr II Aufgebots des Seeoffizierskorps für den bisherigen Vizesteuermann der Seewehr. Berg (Hans).

137

*Translation.*

Certified Copy.

His Majesty the German Emperor and King of Prussia our most gracious war-lord having resolved graciously to nominate and appoint the Vice-Mate (Vizesteuermann) of Seewehr (2nd Naval Reserve) Hans Berg in the Landwehr-district of Flensburg to be a Naval Lieutenant of the Seewehr, second call, of the naval officers corps, His Majesty so does also hereby on the strength of this Commission in such a manner that the same (Berg) shall first and foremost be Faithful, loyal, and obedient to His Imperial and

Royal Majesty and His Majesty's Sovereign House duly safeguard his Position diligently and faithfully carry out, by day and by night, by sea and land, what is incumbent on him to do and perform, and what he is ordered to do behave bravely and beyond reproach in all events of war that may occur, as he is bound to do by his oath; but shall, on the other hand, also enjoy all Prerogative and rights connected with his Position.

In testimony whereof His Majesty has caused this Commission to be imprinted with and to be authorized by his majesty's seal.

So done and given: Great Headquarters, August 10th, 1915. W.

[L. s.]

138 For correct copy.

[L. s.]

(Signed)

SZILLINSKY,

*Aulic Councillor in His Majesty the Emperor  
and King's Cabinet for Naval Affairs.*

Authenticated. Berlin, April 1st, 1916.

The Foreign Office of the German Empire.

By Order:

[L. s.]

(Signed)

KRIEGE.

Copy.

EMBASSY OF THE  
UNITED STATES OF AMERICA, BERLIN.

Seen for the authentication of the foregoing signature this 2nd day of April, 1916.

[L. s.]

J. C. GREW,

*Secretary of Embassy.*

Commission as Naval Lieutenant of Seewehr, second call, of the Naval Officers Corps for the former Vice-Mate of Seewehr Berg (Hans).

139 *Certificate as to the Pendency of Prize Proceedings and Translation.*

Introduced by the Respondents and Filed May 13th, 1916.

Kaiserliches Prisenamt, Hamburg.

A. J. Nr. 1286. A.

HAMBURG, den 1. April, 1916.

Admiralitätstrasse 46.

Ich bescheinige hiermit, daß das Prisenverfahren in Sachen des von dem deutschen Hilfskreuzer "Mowe" aufgebrachten englischen Dampfers "Appam" seit dem 11. Februar 1915 anhängig ist.

Das Prisenamt.

[REAL.]

HASCHE,

*Landgerichtsdirektor.*



Die eigenhandige unterschrift des Landegerichts directors Dr. Hasche wird hierdurch ceglanbigt.  
Berlin den 3. April 1916.

[Seal Der Staatssekretar des Reichs Justizamt.]

ZISCO.

Beglaubigt. Berlin, den 3 April, 1916.  
Das Auswartige, Amt. des Deutschen Reichs.  
Tm. Auftrage.

[SEAL.]

KRIEGE.

EMBASSY OF THE  
UNITED STATES OF AMERICA, BERLIN.

Seen for authentication of the foregoing signature this 3rd day of April, 1916.

ROLAND B. HARVEY,  
II Secretary of Embassy.

140

*Translation.*

Imperial Prize Office, Hamburg.  
A. J. No. 1286. A.

HAMBURG April 1st, 1916.  
Admiralitaetsstrasse 46.

I hereby certify that the prize-proceedings re the English steamer "Appam" captured by the German Auxiliary Cruiser "Mowe" are pending since February 11th, 1916.

The Prize Office.

[L. S.]

(Signed)

HASCHE,  
Director of County Court.

To the Foreign Office, Berlin.

The sign manual of the Director of County Court, Dr. Hasche, is hereby attested.  
Berlin, April 3rd, 1916.

[L. S. the Secretary of the State of the Imperial Office of Justice.]

(Signed)

LISCO.

Authenticated. Berlin, April 3rd, 1916.  
The Foreign Office of the German Empire.  
By Order:

[L. S.]

(Signed)

KRIEGE.

EMBASSY OF THE  
UNITED STATES OF AMERICA, BERLIN.

Seen for authentication of the foregoing signature this 3rd day of April, 1916.

[L. S.]

(Signed)

ROLAND B. HARVEY,  
II Secretary of Embassy.

141 *Reply of German Embassy to Secretary Lansing's Letter.*

Introduced by Respondents and Filed May 13th, 1916.

Kaiserlich Deutsche Botschaft.

J. Nr. A. 1727.

WASHINGTON, D. C., den 16, März, 1916.

Herr Staatssekretär:

In Beantwortung der gefälligen Note vom 2. d. M. beehre ich mich auftragsgemäss in der Anlage eine mir zugegangene Dank-schrift der Kaiserlichen Regierung über die Angedenheit vorzu-legen.

Sollte die Regierung der Vereinigten Staaten der Auffassung der Kaiserlichen Regierung nicht beitreten, so ist es die Absicht der Kaiserlichen Regierung vorzuschlagen, dass die Auslegung des in Frage stehenden Vertrags dem Haager Schiedsgericht vorgelegt wird, in derselben Weise wie es die Kaiserliche Regierung in der Frage des William P. Frye mittels Note des Herrn Staatssekretärs von Jagow an den Botschafter der Vereinigten Staaten in Berlin, Herrn Gerard, von 29. November v. J. vorgeschlagen hat, voraus-gesetzt, dass der status quo des Dampfers Appam während der Dauer der Schiedsgericht-verhandlungen nicht geändert wird und der Dampfer die Erlaubnis erhält, solange mit der Prisenbesatzung in einem amerikanischen Hafen zu verweilen.

Genehmigen Sie, Herr Staatssekretär, die erneute Versicherung meiner ausgezeichnetsten Hochachtung.

(gez.)

BERNSTORFF.

Seiner Exzellenz dem Staatssekretär der Vereinigten Staaten, Herrn Robert Lansing, Washington, D. C.

141½

(Translation.)

Imperial German Communication.

J. No. A-1727.

WASHINGTON, D. C., March 16, 1916.

Mr. Secretary of State:

In reply to your esteemed note of the 2nd instant, I have the honor, being instructed so to do by a communication of the Imperial Government, to lay before you as regards the following:

In case the Government of the United States does not accept the Imperial Government's view, the Imperial Government intends to propose that the explanation of the point involved in the existing treaty shall be submitted to the Hague Peace Tribunal, along the same lines as proposed by the Imperial Government in the case of the William P. Frye, according to Mr. State Secretary von Jagow's note to the representative of the United States at Berlin, Mr. Gerard,

under date of November 29, 1915, provided that the status quo of the Steamer Appam, during the time that this arbitration will take, will not be changed or altered thereby, and the Steamer retains the privilege, along with the Prize Crew, of remaining in an American Port.

Please accept, Mr. Secretary of State, the renewed assurance of my highest esteem.

(Signed)

BERNSTOFF.

To His Excellency, The Secretary of State of the United States, Mr. Robert Lansing, Washington, D. C.

142 *Copy Memorandum of Imperial German Government Attached to Foregoing Letter.*

The Imperial Government does not consider correct the interpretation of the Department of State of article 19 of the treaty 1799 as given in the note.

The Department of State criticized that the Appam was not brought into port by a warship but arrived only with a prize crew on board. The treaty of 1799, referring to prizes accompanied by a warship, speaks, of course, of commercial warfare as it was usual in those times and which could be carried on by both parties only by privateers. This made it necessary that the prize was brought into port by the capturing vessel. The development of modern cruiser warfare where, as a rule, the warship sends her prize into port by a military prize crew, cannot render the stipulations of article 19 of said treaty null and void. The prize masters and prize crew who represent the authority of the belligerent state, now take the place which the capturing vessel held formerly. That such stipulations are not in contradiction to the general rules of international law, and that, therefore, the treaty is not subject to the specially strict interpretation given to it by the Department of State is proved by article 23 of the Hague Convention regarding neutrality on sea which was adopted by a great majority although under reservation by the United States, Great Britain and Japan.

The Department of State missed in the commission of Lieutenant Berg an order to take the prize into a German port as it is unwilling to admit the permanent internment of the German prize in an American port as a consequence of the treaty. As proved by the last but obsolete sentences of article 19 of the treaty of 1785 and article 19 of the treaty of 1799 the object of article 19 is to grant asylum or shelter to prizes of one contracting party in the ports of the other party. The asylum naturally continues only as long as the prize crew is on board and the danger of being captured by enemy naval forces exists. Both premises prevail in this case.

143 Lieutenant Berg, an officer of the Imperial Navy, was commissioned by the Commander of a German warship to seek with his prize in an American port the asylum guaranteed by the treaty. The opinion of the Department of State that the commission must men-

tion a German port of destination for the prize is unfounded as article 19 only provides the freedom of the prize to leave for the places which are named in the commission but does not make the right of asylum depend on such port being mentioned. Such an indication seems superfluous if the prize is conducted by a prize crew mustered from the Imperial Navy, for such crew has to bring the prize into a German port as soon as possible. At present the claim for asylum naturally still exists considering the uneven distribution of the domination of the seas between the belligerents.

As long as the right of asylum lasts the jurisdiction of American courts over the prize is formally excluded by article 19; a German prize court alone is competent. The opinion of the Department of State that the American courts must decide about the claims of the British shipping company is incompatible with the treaty stipulations.

It is, therefore, respectfully requested that the prize crew should be permitted to remain in the American port, and also that the legal steps before an American court should be suspended.

144 *Secretary Lansing's Reply to Communication of the German Embassy.*

Introduced by Respondents and Filed May 13th, 1916.

Abschrift.  
No. 2217.

DEPARTMENT OF STATE,  
WASHINGTON, April 7, 1916.

His Excellency Count J. H. von Bernstorff, Imperial German Ambassador.

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 16th ultimo, enclosing a memorandum of the Imperial German Government on the subject of the Appam, now at Norfolk. The memorandum of the Imperial Government contends, in brief, that Article 19 of the Treaty of 1799 "speaks, of course, of commercial warfare as it was usual in those times and which could be carried on by both parties only by privateers", and that the development of modern cruiser warfare, in which a prize master and crew representing the authority of a belligerent state now take the place which the convoying vessel formerly held, should govern the present interpretation of the treaty. The Government of the United States agrees with the German Government's statement that the Treaty speaks of a mode of warfare in use at the time the Treaty was negotiated. It is precisely for this reason that the Government of the United States does not believe that the Treaty was intended to apply to circumstances of modern warfare which are essentially different from those in vogue at the close of the eighteenth century. The Government of the United States does not understand upon what ground the Imperial Government contends that a treaty grant-

ing concessions under specifically mentioned circumstances  
145 can be construed to apply to a situation involving other and different circumstances. To grant limited asylum in a neutral port to a prize accompanied by the capturing vessel is not the granting of a right of "laying up" in a neutral port a prize which arrives in the control of a prize master and crew.

Your Excellency's Government further contends that article 19, besides being applicable to modern conditions, is not contrary to the general rules of International Law and therefore not subject to a restricting interpretation, and in support of this cites as declaratory of the general rules of International Law Article 23 of Hague Convention XIII. As indicated by the Imperial Government, the United States did not in the case of this convention, and never has, assented to the sequestration of prizes in its ports. The ground of this position of the United States is that it does not, in the opinion of this Government, comport with the obligations of a neutral power to allow its ports to be used either as a place of indefinite refuge for belligerent prizes, or as a place for their sequestration during the proceedings of prize courts. The contention of the Government of the United States in its note of March 2d in this case, is consistent with this long-established and well known policy of the American Government in the light of which the Treaty of 1799 was negotiated and has been enforced and applied. Provided the vessel enters an American port accompanied by a German naval vessel, Article 19 contemplates in the view of this Government merely temporary sojourn of the prize in an American port and not its sequestration there pending the decision of a prize court.

Holding the view that Article 19 is not applicable to the case of the Appam, this Government does not consider it necessary  
146 to discuss the contention of the Imperial Government that under Article 19 American Courts are without jurisdiction to interfere with the prize, and for the same reason it cannot accede to the request that the "legal steps before an American court should be suspended."

In Your Excellency's note transmitting the memorandum of your Government, it is proposed that should this Government fail to concur in the contention of the Imperial Government, the construction of the Treaty in question be referred to the Hague Court of Arbitration in the same way as the Imperial Government has proposed to do in the William P. Frye case, provided that the status quo of the Appam remain unchanged throughout the arbitration proceedings and that the steamer be allowed to remain with her prize crew in an American port during that time. It is regretted that this proposal which appeals to the principle of arbitration, of which this Government is an earnest advocate, cannot be accepted in this particular case by the Government of the United States. Its acceptance would manifestly defeat the very object of the United States in its reservation to Article 23 of Convention XIII, by allowing the prize to remain in an American port for an indefinite period while the arbitration proceedings were in progress, which might continue until after peace is restored. In this respect the case



differs from that of the William P. Frye. Moreover, inasmuch as the Appam has been libelled in the United States District Court by the alleged owners, this Government, under the American system of government, in which the judicial and executive branches are entirely separate and independent, could not vouch for a continuance of the status quo of the prize during the progress of the arbitration proposed by the Imperial Government. The

147 United States Court, having taken jurisdiction of the vessel, that jurisdiction can only be dissolved by judicial proceedings leading to a decision of the court discharging the case—a procedure which the executive cannot summarily terminate.

In these circumstances the Government of the United States could only accept the proposal of the German Government for the arbitration of the meaning of Article 19 of the Treaty of 1799 upon the understanding that the Appam depart from the territorial jurisdiction of the United States, in the event that the libel is dismissed by the Court, and after she has had a reasonable time to take on board such supplies as may be necessary in the judgment of this Government for a voyage to the nearest port subject to the sovereignty of Germany; and failing this, that she be released and the prize master and crew be interned for the remainder of the war.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed)

ROBERT LANSING.

- 148 *Extract from Communication of John Adams, Benjamin Franklin, and Thomas Jefferson, Commissioners (Wharton's Diplomatic Correspondence of the U. S., Vol. 1, Page 559).*

Introduced by the Respondents.

"The practice of carrying prizes into neutral ports and there selling them is admitted by the usage of nations, and can give offense to none who have not guarded against it by particular contract. Were the clause now under consideration to be so changed as to exclude the prizes made on the enemies of either from being sold in the ports of the other, and that kind of stipulation to take place generally, it would operate very injuriously against the United States in cases wherein it is not presumed his Majesty would wish it. For, suppose them to be hereafter in war with any power in Europe—their enemy, though excluded from the ports of every other State, will yet have their own ports at hand into which they may carry and sell the prizes that they shall make on the United States; but the United States, under a like general exclusion, having no ports of their own in Europe, their prizes in these seas must be hazarded across the ocean to seek a market at home, an incumbrance which would cripple all their efforts on that element, and give to their enemies great advantage."

*Note of Libellant's Objections to Admission of Respondents' Evidence.*

To the admission of the foregoing evidence offered by the respondents, the libellant offered separate objections, which were overruled by the Court and the said papers were admitted as evidence by the Court; to which action of the Court the libellant took separate exceptions, the grounds of said objections being that the facts  
149 therein attempted to be established are not matters of record, but should be proven in pais; and that it is incompetent, irrelevant, immaterial and not the best evidence.

*Note of Attendance of Surveyor.*

Mr. John H. Marsden, the surveyor appointed by the order herein entered on April 8th, 1916, was present in Court during the trial of this cause.

*Note of Offer by the Libellant of Sections 110 and 111 of the German Prize Code.*

(From Stenographer's Transcript.)

By Mr. Bullowa: We have here, received by the Clerk of the Court from the Librarian of Congress, the 1914 volume of the German Reichsgesetzblatt, which is an official publication of the German Government, printed by the German Government. We offer in evidence Sections 110 and 111 of this.

(Section 110:)

110. In case of need, H. M. ships, and the war vessels of an allied state and captured vessels, may take portions of the cargo, equipment and stores of captured enemy vessels to supply such needs, in so far as the goods taken are not unquestionably neutral property. A receipt must be given.

The same may be done in respect of neutral vessels only if the master can be induced to sell the same or to part with them under the circumstances set forth in article 46, or where the objects are subject to condemnation under article 117 or article 121, regarding the destruction or release of the neutral vessel. Acts done in contravention hereto would entitle the neutral power to assert valid claims.

Regarding a taking by the prize crew, see article 127.

(Section 111:)

111. The commander provides for bringing the vessel into a German port or the port of an ally with all possible dispatch and safety. A prize may be brought into a neutral port only if the neutral

power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel or supplies. In the latter cases she must leave as soon as the cause justifying her entrance ceases to exist.

The commander gives to the officer of the prize crew the necessary written instructions in regard to the voyage, and makes up the crew so as to enable the officer to bring in the vessel.

149½ Admitted, subject to exception after examination.

The same was afterwards objected to by the respondents and excluded by the Court, to which action the libellant duly excepted.

150

*Opinion of District Judge Waddill.*

Filed July 29th, 1916.

Libels to Recover Possession of the Steamship "Appam" and of Her Cargo.

Messrs. Frederic R. Condert, James K. Symmers, Howard Thayer Kingsbury and Ralph James M. Bullowa, all of New York City, and Hughes & Vandeventer, of Norfolk, Va., for libellants; Messrs. John W. Clifton, of Washington, D. C., Norvin R. Lindheim and Walter S. Penfield, of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for respondents.

151 These are suits in admiralty, brought respectively by the owner and master, to recover possession of the British steamship "Appam," now lying at Newport News, Virginia, and her cargo.

On the 15th of January, 1916, about three o'clock in the afternoon, during the existence of a state of war between the Empires of Great Britain and Germany, the steamship Appam was captured on the high seas by the German cruiser "Moewa," in latitude 33.19 N. longitude 14.24 W.

The Appam, flying the British flag, and registered as an English vessel, is a modern passenger and cargo steamship, 440 feet long, 58 feet broad, 35 feet deep, and 7,800 tons gross burden, built in Belfast, Ireland, in February, 1913, since which time she has been engaged in commerce, with the exception of a short period about a year prior to her capture, as hereinafter shown, when she was used as a transport for troops. She had made twelve voyages to, and was on the return trip of her thirteenth voyage from the West Coast of Africa to Liverpool, carrying a general cargo of cocoon beans, palm oil, kernals, tin, maize, sixteen boxes of specie, and other articles. At the West African port, she took on one hundred and seventy passengers, of whom twenty two were Germans, nineteen men and three women, eight of them being military prisoners of the English government. She had a crew of about one hun-

dred and sixty all told, and carried a three pounder gun on her stern.

The Moewe, flying the German ensign, approached the Appam on her starboard side, and when about one hundred yards away, fired a gun across the bow of the latter as a signal to stop, which she did, and she was boarded, without resistance, by an armed crew from the Moewe, who brought with them several buckets with  
152 peculiar looking things in them, some round, two bombs were slung, one over the bow, and one over the stern of the Appam. An officer from the Moewe said to the captain of the Appam that he was sorry, but he had to take his ship, and asked him how many passengers he had, and what cargo; whether he had any specie, and how much coal. When the shot was fired by the Moewe, the captain of the Appam instructed his wireless operator not to touch the wireless instrument, and his officers "on no account to let any one touch that gun we have on board." The officers and crew of the Appam, with the exception of the engine room force, thirty-five in number, and the second officer, were then ordered on board the Moewe, where the captain was told by the officer commanding that vessel: "You are a very lucky man; I would have fired at you if you had attempted to escape; I would have sunk you." The captain, officers and crew of the Appam were then sent below, between decks, down in the hold, where they were kept until the evening of the seventeenth of January, when they and also about one hundred and fifty persons, officers and crews of five or six vessels previously sunk by the Moewe, were ordered back to the Appam, and kept on board as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the Appam, that he was now a member of the German Navy; to which the chief replied that he did not think he was; and the senior officer said "This is no laughing matter, and if you do not obey my orders, I will blow your brains out, but if you obey me, not a hair of your head will be touched." He also told him to tell his staff the same thing, and if they did not obey his orders, to bring them to him, and they would be shot. He thereupon enquired as to the quantity of coal on hand, the various revolutions of the engines; also the coal consumption for different speeds; and directed that steam be kept up handy, and  
153 about six o'clock in the evening, the engineer was directed to set the engines at the revolutions required, and they got under way. The German officer told the chief engineer to report to him at eight o'clock the next morning, the tonnage of coal and stores that he had, which he did. On reporting on the second morning, Mr. Berg was for the first time, seen by the engineer, and he was told that he (Berg) was now in charge of the ship, and asked him for the same information as to fuel consumption and revolutions which he had given to the former officer; and also said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did do so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor was

stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who relieved each other, and were constantly in the engine room, but did not interfere with the working of the engines. Lieutenant Berg gave directions as to working the engines, and was the only officer on board who wore uniform. On the night of the capture, January 15th, the specie in the specie room was taken by the boarding party and lowered into a boat, and then taken on board the raider. After Lieutenant Berg was put in charge of the Appam, and the officers and men were ordered back on board of her, bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pound- of explosives, was placed on the bridge, and several smaller ones in the chart room.

When the captain of the Appam came on board from the  
154 Moewe, Lieutenant Berg pointed to a large object standing on the deck, and said to him: "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said: "There are other bombs about the ship; I do not want to use it, but I shall be compelled to if there is any trouble." During the passage, the captain of the Appam asked Lieutenant Berg, if they met an English cruiser, what would be done, and Lieutenant Berg replied that if possible he would give them ten minutes to get into the boats, but if the cruiser attempted a capture, she would be blown up. The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed, and Lieutenant Berg asked the crew of the Appam to drop the anchor, as he had not men to do it, on reaching Hampton Roads.

During the trip westward, the officers and crew of the Appam were not allowed to see the ship's compass to ascertain her course; and all lights were obscured during the voyage; no one was allowed to smoke or strike matches on deck, and the power of the navigation lights was lessened also. The German prisoners, with the exception of two who went on board the Moewe, were armed, and placed over the passengers and crew of the Appam as a guard all the way across. They wore armulets, consisting of a white band around the arm, and had rifles and revolvers, and received their orders from Lieutenant Berg.

For two days following the capture, the Appam remained in the vicinity of the Moewe, until she was started westward. Her course for the first two or three days was southwesterly varying, and afterwards westerly, and so continued until her arrival at the Virginia  
Capes on the 31st of January. The entire engine room staff

155 of the Appam was on duty operating the vessel across to the United States; the deck crew of the Appam kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German civilian prisoners. The night before the Appam arrived at the Capes, all of her crew were ordered below, and not allowed on deck after nine o'clock.

At the time of the capture, the Appam was approximately distant 1,590 miles from Emden, the nearest German port, and from the nearest available port, namely, Punchello, in the Madeiras, 130



miles; from Liverpool, 1,450 miles, and from Hampton Roads, 3,051 miles.

The evidence shows that the Appam was in first class order, quite seaworthy, and with plenty of provisions both when captured, and at the time of her arrival in Hampton Roads.

There is no conflict in the testimony as to the facts stated, the same having been testified to by the master, first officer and chief engineer of the Appam. No witnesses were called in reply by the respondents, though Lieutenant Berg was present in court during the entire trial, and the German Crew remaining with him on the ship were within easy call of the court.

Upon her arrival at Hampton Roads, the Collector of the port was duly advised of the presence of the ship by Lieutenant Berg, and application was at once made to the Secretary of State for the vessel's internment, and also for the internment of the crew of the Appam, because of alleged resistance to capture. The right of internment of the Appam was denied, and her crew was released with their personal effects.

Subsequent to the filing of the libels, the perishable portion of the cargo of the Appam was ordered sold by the court, bringing some six hundred and thirty four thousand dollars, which fund is now in the registry of the court awaiting the court's determination of this matter.

WADDILL, *District Judge* (after stating the facts as above):

From this brief summary of the facts, it will be seen that the question for consideration is whether the vessel and her cargo, belonging to a subject of Great Britain, captured by a cruiser of the German Empire, upon the high seas, during the existence of war between the two countries, can be brought by a prize master and crew into the waters of the United States, for the purpose of being there laid up.

The libellants earnestly urge that this can not be done, and that the coming in, as well as the insistence upon the right of asylum under the circumstances of this case, constitutes a violation of the neutrality of the United States, entitling the owners to restitution of their property; whereas, the respondents maintain the right to bring in their prize, as well as the right of asylum for the same, during pleasure, pending the continuance of the war, and insist that such right exists as well under general international law, as under treaty existing between this country and Prussia, now a part of the German empire; that the prize is the property of the German government by reason of its capture from a citizen of a belligerent country on the high seas, by one of its duly commissioned war vessels; that the title or right of possession thereto can not be enquired into by this government, or the respondents impleaded in the courts of the United States; that the court of the captor country alone can determine the validity of the seizure and title to said prize; and that this government, under the existing treaty can not deny to the capturing country the right of asylum for said prize.

The court has been most fortunate in having the benefit of the arguments of able and accomplished counsel presenting the respective contentions; and almost every conceivable question and kindred subjects, bearing incidentally on the issues involved, have received the careful consideration of counsel, and the case has been fully, ably and completely presented and argued, which greatly lightens the burden of the court in reaching its conclusion, as well on the merits of the controversy, as in determining the crucial points involved, and eliminating those unnecessary to be passed upon.

The court will not attempt any general discussion or review of the authorities upon many of the views presented, as to do so would serve no good purpose, and unduly lengthen this opinion; but will confine itself to the consideration of the several material questions arising in the case, under its peculiar facts and circumstances. This, it will be borne in mind, is not a case of a war, public, or merchant vessel, seeking internment in the waters of the United States, nor of any such vessel coming in for temporary sojourn; nor a war vessel bringing in its prize captured at sea; nor of such war vessel sending its prize under the convoy of a war vessel; nor of a captor with its prize, forced in by reason of stress of weather, want of fuel or provisions, or for necessary repairs; but that of a vessel captured at sea, placed in charge of a prize master and 22 German sailors, who had been British prisoners on the Appam, and who, together with the Appam's crew, working under duress and threat of the loss of their lives, navigated the ship across the ocean, some fifteen hundred  
158 miles further from the scene of the capture, than to the nearest German port, into Hampton Roads, an inland water of the United States, within the jurisdiction of this court, for the purpose of indefinite asylum; the wording of the commission of the Prize Master being to "take her to the nearest American port and there to lay her up."

Treating this case in its true light, these considerations arise, and become material, namely: (1) What are the rights existing between this country and Germany, respecting the right of entry of prizes of war captured at sea, and of asylum, in the waters of the United States, whether arising under treaty or international law; (2) has this court jurisdiction to entertain these suits for restitution of the property in question to its owners; and (3) what is the character of the property seized, whether public or private, and can the court, as against the German government, who claims the right to adjudicate its title by its own prize court, determine the rights thereof, and afford relief as between the litigants?

### First.

The respondents vigorously maintained from the coming in of the prize, and the inception of this litigation, the right to bring the Appam and her cargo in for the purpose of asylum, as well under treaty with this country, as under international law, and rely especially on the treaty between the United States and Prussia of 1799, as renewed and continued in 1828, in support thereof.

Promptly after the institution of these proceedings, the German government, acting through its Ambassador at Washington, filed protests with the Secretary of State of the United States, 159 against the prosecution of the same, and the seizure of the ship and cargo, and requested that the United States, through their proper legal department, intervene and cause the dismissal of the proceedings. Whereupon, the Attorney General, acting through the United States Attorney for this district, appeared as amicus curiæ, and brought to the attention of the court, the aforesaid position of the German government; and the same defense was in more elaborate form interposed by the German government, in the proceedings in this cause. The German Ambassador, Count J. H. von Bernstorff, stated his government's position in his communication to the Secretary of State, as shown by the following extracts therefrom:

"As the 'Appam' was captured at sea by a German man of war and brought to the Virginian port as a prize ship according to the treaty existing between our countries, you may well appreciate my surprise at the action which has been taken.

"Article XIX of the treaty of 1799 between Prussia and the United States, renewed in part by Article XII of the treaty of 1828, provides that 'the vessels and effects taken from' the enemies of the contracting parties may be carried freely wheresoever they please and that such prizes shall not be 'put under legal process, when they come to and enter the ports of the other party, etc. etc.'

"In view of the terms of the treaty, I am at a loss to understand why such action has been taken by a court of your country. \* \* \*

"Besides the 'Appam' flies the naval flag of and belongs to the German government and therefore the possession of the captors in a neutral port is the possession of their sovereign. The 160 sovereign whose officers have captured the vessel as a prize of war remains in possession of that vessel and has full power over her. The neutral sovereign or its court can take no cognizance of the question of prize or no prize and cannot wrest from the possession of the captor a prize of war brought into its port."

He insisted also that Article 21 of the Hague Conventions concerning the rights and duties of neutral powers in naval war, had no application, because not assented to by Great Britain. In a later communication, he further contended that his government was entitled to the rights claimed under general principles of international law as well as under the specific terms of the treaty aforesaid.

The Secretary of State, the Honorable Robert Lansing, although he complied with the German Ambassador's request to make known his country's contention to the court, made specific reply to his communications, setting forth his interpretation of the treaty relied on, as well as his understanding of the international law involved, and the position of the government of the United States regarding both matters, and of the right of the Appam and her cargo to seek asylum in the waters of the United States. The following extracts from the letters of the Secretary of State to the German Ambassador, dated respectively March 2nd, and April 7th, 1916, show fully and clearly

his conclusions and rulings in the premisses. (From letter of March 2, 1916, referred to.)

"Article XIX of the Treaty of 1799, to which Your Excellency refers, reads as follows:—

"The vessels of war, public and private, of both parties, shall carry (conduire) freely, wheresoever they please, the vessels and effects taken (pris) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (prises) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (conduites) out again at any time by their captors (le vaisseau preneur) to the places expressed in their commissions, which the commanding officer of such vessel (le dit vaisseau) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (vaisseau) that shall have made a prize (prise) upon British subjects shall have a right to shelter in ports of the United States, but if (il est) forced therein by tempests, or any other danger or accident of the sea, they (il cerra) shall be obligated to depart as soon as possible."

(The last provision of the above treaty, excepting Great Britain from its operation, was abrogated by the treaty of 1828.)

"This translation is taken from the published treaties of the United States, and while not conforming strictly to the original French text (a copy of which is enclosed), is sufficiently accurate for the purposes of this note. At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum for prizes brought into neutral ports by men-of-war, it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The Appam, however, as Your Excellency is aware

was not accompanied by a ship of war, but came into the port of Norfolk alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privilege of carrying out their prizes again 'to the places expressed in their commissions.' The Commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the Appam, the commission of Lieutenant Berg, a copy of which was given to the Collector of Customs at Norfolk, not only is a commission of a prize master, but directs him to bring the Appam to the nearest American port, and 'there to lay her up.' In the opinion of the government of the United States, therefore, the case of the Appam does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of the spoils of war in an American port. In this

interpretation of the treaty, which I believe is the only one warranted by the terms of the provision and by the British treaties referred to in Article XIX, and by other contemporaneous treaties, the Government of the United States considers itself free from any obligation to accord to the Appam the privileges stipulated in Article XIX of the Treaty of 1799.

"Under this construction of the Treaty, the Appam can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of War, namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions, or  
163 necessity of repairs, but to leave as soon as the cause of their entry has been removed."

(From letter of April 7th, 1916, referred to.)

"The Government of the United States agrees with the German Government's statement that the Treaty speaks of a mode of warfare in use at the time the Treaty was negotiated. It is precisely for this reason that the Government of the United States does not believe that the Treaty was intended to apply to circumstances of modern warfare which are essentially different from those in vogue at the close of the eighteenth century. The Government of the United States does not understand upon what ground the Imperial Government contends that a treaty granting concessions under specifically mentioned circumstances, can be construed to apply to a situation involving other and different circumstances. To grant limited asylum in a neutral port to a prize accompanied by the capturing vessel is not the granting of a right of 'laying up' in a neutral port a prize which arrives in the control of a prize master and crew.

"Your Excellency's Government further contends that Article 19, besides being applicable to modern conditions, is not contrary to the general rules of International Law and therefore not subject to a restricting interpretation, and in support of this cites as declaratory of the general rules of International Law Article 23 of Hague Convention XIII. As indicated by the Imperial Government, the United States did not in the case of this convention, and never has, assented to the sequestration of prizes in its ports. The ground of this position of the United States is that it does not, in the opinion

of this Government, comport with the obligations of a neutral  
164 power to allow its ports to be used either as a place of indefinite refuge for belligerent prizes, or as a place for their sequestration during the proceedings of prize courts. The contention of the Government of the United States in its note of March 2nd in this case, is consistent with this long-established and well-known policy of the American Government in the light of which the Treaty of 1799 was negotiated and has been enforced and applied. Provided the vessel enters an American port accompanied by a German naval vessel, Article 19 contemplates in the view of this Government merely temporary sojourn of the prize in an American port and not its sequestration there pending the decision of a prize court.

"Holding the view that Article 19 is not applicable to the case



of the Appam, this Government does not consider it necessary to discuss the contention of the Imperial Government that under Article 19 American Courts are without jurisdiction to interfere with the prize, and for the same reason it cannot accede to the request that the 'legal steps before an American court should be suspended.'"

The letter further stated that the question of the court's jurisdiction was one for judicial ascertainment, and not executive determination.

The correct determination of the questions presented by the notes of the diplomatic representatives of the two governments, will in large measure dispose of the more important issues involved in this litigation, since it is apparent that if the view taken by the German Ambassador of the Prussian Treaty be accepted, then the Appam had the right by express treaty to come in for the purpose of laying up, as her prize master's commission directed; and the  
 165 German government would be entitled to the free use of the waters of the United States during the existence of the war, as a rendezvous, or indefinite place of abode for prizes of war.

The gravity of this situation is manifest, and if the contention is correct, its value to the German government, on the one hand, and the serious responsibilities and consequences to the United States on the other, can not well be overestimated. The weight that should be given to the opinion and ruling of the Secretary of State, an able and accomplished diplomat, in construing the Prussian Treaty, need not be dwelt upon, since the court is in full accord with his interpretation, further than to say that it has special significance as a decision and ruling of the executive branch of the government, having to do with international matters, rendered after its authority had been invoked by the German government, in this very matter.

The history of the adoption of this treaty with Prussia, the conditions that brought about the same, and the contemporaneous opinions of the eminent statesmen of that day, who participated in its procurement and acceptance by the two countries, has been gone into fully in the effort to show that it was meant to give asylum to prizes in neutral waters; and that its particular purpose was to afford the United States an asylum for their prizes in Prussian waters. Whatever may have been the view of those representing this country at that time, it seems clear to the court that no such enlarged and far reaching view of the treaty as is now claimed for it, can for a moment be entertained at this day, in the light of present methods of warfare, and the laws, rules and regulations affecting the neutrality of nations in existence now for nearly one  
 166 hundred years. Anciently it was believed permissible for one nation to grant to another, rights and privileges in its waters not granted to others. Such may be said to have been the character of our treaties of Amity and Commerce in 1778, with France; but the painful outcome of our experiences, growing out of those treaties, and the position taken by this government, ultimately, in connection with them, would seem to dispel the idea that this country, even in that early period, ever intended to afford a

harbor of refuge for prizes of war of any other nation, and certainly such idea is now uniformly negated by the customs of all nations. Article XVII of the Treaty of Amity and Commerce, is substantially in the terms of the Prussian treaty now being considered; and under the interpretation placed upon it by the United States (see Mr. Jefferson's letter to Gallatin, June 28, 1801, Moore's Digest, sec. 1302, page 931), the claim here made that a prize master could bring in his prize for indefinite asylum, was not maintained.

A careful review of the provisions of the Prussian treaty, when read in the light of the rulings and interpretation placed upon other contemporaneous treaties, especially Article XVII of the treaty of Amity and Commerce with France in 1778, convinces the court that the Secretary of State's ruling is correct, and that under the same, prizes can not be brought into the waters of the United States for the purpose of laying up by a prize master, but can only be brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize, and then not for an indefinite period, but for the temporary causes recognized by International Law.

What are the rights of the Appam under general international law? Was she entitled to come into the waters of the United States, and if so, has she the right of asylum therein? These questions must be answered in the light of that law. The generally accepted doctrine now is that enlightened nations do not allow the use of their ports as asylum or permanent rendezvous of prizes of other nations captured during war. To do so would tend to involve the neutral powers in conflict with nations with whom they are at peace; and to extend the use of their ports to all belligerents alike, would not relieve the objection, as the opposing vessels so using them might quickly cause conflict in neutral territory. The policy of the United States has been, and is consistently opposed to such use of their waters and harbors; and the history and origin of their neutrality laws, and the circumstances of their passage, clearly indicate a purpose to prohibit the use of their ports for the laying up of belligerent prizes.

The provisions of Articles 21 and 22 of the Hague Convention (XIII) of 1907, are declaratory of the existing law of nations, and the fact that Article 23, which provided for the use of neutral ports by belligerent prizes, was expressly rejected, and 21 and 22 adopted by the United States, but emphasizes its policy respecting the subject. It is true Great Britain did not ratify the action of its Commissioners, assenting to the provisions of Articles 21 and 22 of the Hague Convention, though most of the other powers, some 43 in number, including Germany and the United States, did. Still, it nevertheless shows what the policy of the United States and Germany alike was, in regard to the use of their waters and harbors for belligerent prizes. Articles 21 and 22 are as follows:—

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

103 It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power

must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

"Article 22. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

The American delegates reported regarding these Articles:

"Articles 21 and 25 relate to the admission of prizes to neutral ports. Articles 21 and 22 seem to be unobjectionable. Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse, and should not be approved."

The Hague Convention (XIII) was signed at the Hague on the 13th of October, 1907, and was ratified by the Senate of the United States in executive session on the 17th of April, 1908. That body, however, excepted and excluded article 23 (36. Stat. L. part 2, p. 2438). The law, as shown in Dana's note (1866) to Wheaton's International Law, 8th American Edition, sec. 391, is as follows:

"The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in cases of necessity; and they may remain in the ports only for a meeting of the exigency. The necessity must be one arising from perils of the seas, or need  
169 of repairs for seaworthiness, or provisions and supplies."

The British government, at the beginning of the civil war in the United States, took this position, and so instructed the British admiralty. Subsequently, like position was taken by other prominent powers, and the same view has been taken generally from time to time by different nations down to our war with Spain in 1898, and to the present time. It was said by Attorney General Wirt:

"It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports, and put in a condition to be taken to the port of the captor for adjudication." (2 Op. Att'y Gen., 86).

Mr. Seward, Secretary of State, replying to the Peruvian Legation as to the position of the United States respecting the war between Spain and Peru, said:

"This Government will observe the neutrality which is enjoined by its own Municipal Law and by the law of nations. No armed vessel of either party will be allowed to bring their prizes into the ports of the United States." Moore's Digest, Sec. 1302, p. 738.

In the *Flad Oyen* case, (1 C. Rob. 135) Lord Stowell, considering the subject, said:

"It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair advantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could

no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

170 "Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war within their cities, would be to make their coasts a station of hostility."

Reference may also be had to Hall's International Law, 5th Edition, p. 618, and "Laws of War," Risley, p. 176; Bluntschli on International Law, sec. 778, Int. Law, Note.

The right of belligerents to use neutral waters, as an asylum for prizes, can no longer be successfully contended for.

### Second.

Considering the question of the jurisdiction of the court to entertain these suits, for restitution of the Appam and her cargo to the owners of the same, raised by the respondent, and earnestly insisted upon in argument, it may be said, without discussing the precedents of other countries favorable thereto, that the jurisdiction and authority of the courts of admiralty of the United States to entertain possessory actions for the restitution to their owners, of prizes of war seized for violation of the neutrality laws, is no longer open for serious consideration. The subject was long one of much controversy, particularly whether restitution should be made by the executive or judicial branches of the government, and the authorities for a time sustained the view that the courts were without such power. *Moxon v. The Fanny*, 2 Peters Admiralty, 309; 17 Fed. Cas. No. 9895; *Findley v. The William*, 1 Peters Admiralty, 12, 9 Fed. Cas. No. 4790; *Stanwick v. The Ship Friendship*, Bee's Admiralty Rep. 40; *Moodie v. The Ship Amity*, Bee's Admiralty Rep. 89. But this position is no longer maintainable, and

171 has not been since the decision of the supreme court in the case of the *Betsy*, 3 Dallas, 6. There the question of jurisdiction was directly raised, and the supreme court held that the district courts, being possessed of all the powers of courts of admiralty, instance as well as prize courts, were competent to decide whether restitution should be made, and the law has been thus settled for more than one hundred years. *The Santissima Trinidad*, 1 Brockenbrough 438, Fed. Cas. 2568, affirmed in 7 Wheat. 283, a case from this court, was a decision of Chief Justice Marshall, sitting in the circuit court, in which he at length considered the question of whether restitution could be made, as well by the court, as by the executive branch of the government, and whether the same should be awarded at the instance of the private owners, and he sustained the jurisdiction of the court in both particulars, and ordered restitution of the prize seized for violation of the neutrality laws of the United States, to its owners. The supreme court, on appeal, affirmed the decision of the district court, rendered by Judge Saint George Tucker, the able jurist and author, and that of Chief Justice Marshall, sitting in review on circuit, and said:

"1. That 'whatever may be the exemption of the public ship herself and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and enquiry, and, if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality.' "

It is earnestly insisted on behalf of the respondents that notwithstanding these and like decisions containing the same views, restitution will be decreed only in cases where the prize was captured within the territorial limits of the United States, or the  
172 capturing vessel was illegally fitted out in this country, and that the court is without jurisdiction, save in the two classes of cases named.

There is much force in this position, especially as the adjudicated cases in the United States supreme court are mainly confined to those arising from the violation of the neutrality of one or other of the two prescribed classes. But it does not follow that had there been neutrality violations in other respects, a like remedy would not have been accorded. The jurisdiction was assumed, and the remedy afforded, because of the violation of the neutrality of the United States; and where the same arose either from an invasion of our territory by a belligerent, and the capture of an enemy vessel in our waters, or by the fitting out of a vessel within this country for the purpose of depredating upon the commerce of the enemy, undoubtedly relief could be afforded by the restitution of the property thus unlawfully and forcibly taken, to its lawful owners. It was, however, not because it occurred in either of the two ways indicated. Had a like result followed in other unlawful manner, whereby there was an infraction of the neutrality of the United States, exactly the same relief should and would have been given. The question, therefore, to be determined in the present case is, in the language of the supreme court in the *Santissima Trinidad* case, 7 Wheat. 354-5, whether a proper case has been made out against the prize property, upon examination and enquiry, justifying its restitution to those from whom it was taken, by reason of bringing the same into our ports in violation of our neutrality; if so, the relief asked for by the libellants should be granted, entirely regardless of whether a like case may have heretofore arisen, or whether any other court of the United States may have been called upon to meet a similar contingency. Let it once be conceded  
173 that the prize is within neutral territory, and it was there brought in violation of the laws of neutrality, whether arising from breach of treaty obligation, or by reason of international law, then, under the laws of the United States, the right of restitution arises, and its courts of admiralty charged with the administration and enforcement of international law respecting maritime matters, should in a proper case, afford relief, by restoring the prize property to its lawful owner.

In *Paquete Habana*, 175 U. S. 677, 700, Mr. Justice Gray, speaking for the supreme court, said:

"International law is part of our law and must be ascertained and



administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act, or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is." *Hylton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215; *The Estrella*, supra, 4 Wheat. 298; *The brigantine Vrouw Christina Magdalena*, Fed. Cas. 7216; *The Adventure*, 8 Cranch, 221.

The last named case is an illuminating one in the light of the contention made here. The *Adventure* was a British vessel which had been captured on the high seas by two French frigates, and after taking out parts of her cargo, she was given by the captors to the American crews (then neutral) of two vessels which the French frigates had just captured and burned. The *Adventure* was thereupon navigated by her donees to Norfolk, where she arrived  
 174 on the first day of October, 1812, and was promptly libelled by the acting captain and crew as their property, acquired under the donation of the French captor. The United States appeared and interposed a claim for forfeiture under the "Non-Importation" act. The case finally reached the supreme court of the United States, where it was decided adversely alike to the claim of the government, and that of the libellants, and determined in favor of the British owners, subject to the adjustment of complications which had arisen between that government and this country, growing out of hostilities which occurred after the bringing in of the prize property; and that the donees, the libellants, as citizens of a neutral country, were entitled only to a proper reward for safe-keeping the property, and bringing it into a neutral port, the court saying:

"Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize master navigating the prize in pursuance of orders from his commander. The vessel remained liable to British capture on the whole voyage, and, on her arrival in a neutral territory, the donee sank into a mere bailee for the British claimant, with those rights over the thing in possession which the civil law gave for the care and labor bestowed upon it."

This decision is significant in its bearing upon this case. It was a capture on the high seas, and jurisdiction was entertained, and the property restored to its owner, although it did not come within the two exceptions contended for by the respondents. Moreover, it negatives the idea of a complete title in the captor, and in effect  
 175 maintains that the prize master could not have brought the prize into neutral waters, without forfeiting the same to the owner; and that his right to bring the vessel *infra presidia* (a place of safety) into this country, unless excused on account of

necessity, would have been an unneutral act, reviving the right of the owner to the vessel.

The Queen v. The Chesapeake, 1 Oldright's Nova Scotia Reports, 769, was the case of an American vessel sailing from New York, captured by certain persons bearing a commission from the Confederate States Government, shipped thereon as passengers. After sailing from New York, they overpowered the captain and crew, and took the vessel into a Canadian port. Suit was instituted in the name of the Crown for forfeiture of the vessel for violation of the British neutrality. Claim was made on behalf of the private owners, and restitution was ordered, on payment of costs and expenses. (Moore's Digest, International Law, vol. 1, p. 366, vol. 7, p. 937.) In the course of his opinion deciding the question, the judge of the vice-admiralty court said: "By the affidavits upon which I granted a warrant it is certain that the Chesapeake, if a prize at all, is an uncondemned prize. For a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it ipso facto subjects that prize to forfeiture. For a neutral state to afford such protection would be an act justly offensive to the other belligerent state." At the prior hearing of the case, the court also said: "I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say remote uses, such as procuring provisions and refreshments and acts of that nature which the Law of Nations universally tolerates, but that no proximate acts of war  
176 are in any way whatever to the allowed to originate on neutral grounds."

This power on the part of the courts of the United States may not be given specifically by any statute, as required for the exercise of criminal jurisdiction, but arises from the authority reposed in them under the constitution as courts of admiralty and common law, charged with the duty of administering the law of nations.

### Third.

Respondents further maintain that the Appam and her cargo can not be proceeded against in these causes, because title to the same vested in the German Government by reason of capture at sea by a German war vessel from an enemy country; that the Appam is a lawful prize of war, entitled to remain in the waters of the United States, a neutral power, without interference on the part of that government; and that its title can only be enquired into and divested by the action of the prize court of their own country.

No claim that the Appam is a public war vessel of the German empire can be maintained under the facts of this case. Indeed, in the pleadings, the contention is not made, and on the contrary she is claimed to be a prize of war, which places her in an entirely different category as respects title and ownership. Under modern authority, title does not become vested in the captor of the prize by mere capture, and not until lawful condemnation is had by the proper court of the captor country. This is particularly true where

the prize is not taken into the captor's country. In the *Nassau*, 4 Wall. 640, the supreme court of the United States said:

"It is the practice with civilized nations when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the government of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property."

In the *Manila Prize Cases*, 188 U. S. 260, the supreme court said: "Ordinarily the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation."

The Resolution, 2 Dallas, 1, 5.

The reason of this rule is manifest; and arises from the fact that until lawful condemnation by a court of competent jurisdiction is had of the prize property, the title of the captor, as between himself and the owner, is incomplete and inchoate, and circumstances may readily arise, of which this case affords an example, in which the title of the captor might never become vested, by reason of his own act.

Nor is the contention tenable that the *Appam* and her cargo have the undisputed right to stay in the United States, and that that Government can not controvert her right, or this court entertain jurisdiction of these proceedings, and grant the proper relief to the libellants, irrespective of what the German prize court may do regarding the condemnation of the prize property. If the prize had been taken to a port of the captor country, or that of one of its allies, instead of to this, a neutral country, in violation of its laws, and of its international obligations to other countries, there would be great force in the position taken. Here, a very different situation arises, in which it is manifest that the claim that this

court should wait, or be controlled by what the German prize court does, is without merit. This position as to the effect of the prize court proceedings of the captor country has been often taken, and nowhere more positively denied than by the supreme court of the United States; and the same may now be said to be generally settled adversely to the claim made.

In *L'Invincible*, 1 Wheat. 233, the court said:

"That the mere fact of seizure as prize does not of itself oust the neutral admiralty court of its jurisdiction is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession, to wit, those in which her own right to stand neutral is invaded."

The *Divina Pastora*, 4 Wheat. 52, the court said: "But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

In the *Santissima Trinidad* case, 7 Wheat. 554-5, *supra*, the supreme court further said:

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"And 2, 'That where a property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can by its adjudication rightfully take away its jurisdiction or forestall and defeat its judgment.'"

Other cases sustaining these general views will be found in the same volume of Wheaton's Reports, pages 490, 496, 520.

In the case of the *Henrick and Maria*, 4 C. Rob. 43, Lord Stowell said: "Upon principle, therefore, it is not to be asserted that a ship brought into a neutral port is with effect proceeded against in the belligerent country. The *res ipsa*, the *corpus*, is not within  
179 the possession of the court; and possession, in such cases, founds the jurisdiction."

Dr. Lushington, the great authority on maritime matters, said:

"I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captor's country, and the court must guard itself against allowing a precedent to the contrary to be established."  
(*The Polka*, Spinks Ecclesiastical and Admiralty Reports, 447.)

In Dana's Note to Wheaton's International Law, 1866, it is said:

"But apart from any such practice of neutrals, it seems clear that to allow prizes to fly to a neutral port and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts in neutral ports. It seems, therefore, to be the tendency, if not the settled rule, now, that a decree of condemnation will not be passed against prizes remaining abroad, unless in case of necessity, or if passed, will not be respected by other nations."

(Wheaton's Int. Law, 8th Am. Ed. Sec. 391.)

The further contention is made by the respondent that the violation of neutrality to be cognizable, must be proved to have contributed to the capture, and that subsequent or otherwise unrelated violations are immaterial. This proposition the court cannot assent to; that is, that there may be no violations of neutrality after the prize is captured, entitling the belligerent owner to restitution  
180 at the hands of a neutral government, in whose country the property may be found. In this case, the fact should not be lost sight of that the violation of the neutrality of the United States is exceedingly closely related to the capture itself. This capture, it is true, was well away on the high seas, but the captors of their own volition, and for their own purposes, determined not to take, or attempt to take the prize to one of their own ports, or that of their allies, where alone the validity of the capture could be determined, though in distance not more than half so far away as the United States, nor to hazard longer the chances of her recapture at sea, but required the ship's officers and crew, under duress, to bring the ship into the nearest port of the United States, there to be laid up, and she was so brought, and the effort to secure permission to lay up was unsuccessfully made. From the moment of the capture, to that of

entering the Virginia Capes, the Appam and her cargo were subject to recapture by the ships of the owner's country or that of their allies, or to be retaken by the owner. Should other or greater rights be secured by taking refuge in the harbor of a neutral, which the Appam had no right to enter without flagrantly violating the laws of neutrality? Does not such violation having for its object the getting away with the prize and the safe keeping of the same, so relate back to the original seizure, as to become a part thereof? Is not the capture, the flight to a supposed place of safety, and the successful entry therein, but one continuous occurrence, and should she, thus attempting to avail herself of the use of neutral waters for the purpose of escape with her prize, in contravention of the laws of neutrality, do so, without at the same time incurring the consequences of the violation? The failure to take, or even attempt to take the prize to a port of the captor's country, or that of an ally, where prize proceedings could regularly and lawfully have been inaugurated, should prevent the captor from denying to the owner a day to be heard in the courts of the neutral country, where of choice, the prize had been brought and deposited, respecting his right to restitution of his property by reason of the violation of the neutrality of such neutral country. The validity of the capture, as well as all questions of prize law, are to be determined by the German prize court, and are not matters for the consideration of this court; but this court has the right to determine whether the neutrality laws of the United States have been violated, and the consequences thereof, as bearing upon the restitution of the prize property to its owners, (*The Estrella*, 4 Wheat. 308) and in a proper case to restore the same to them.

The court's conclusion is that the manner of bringing the Appam into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the Imperial Government of the German Empire; and it will be so ordered.

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### *Order Appointing Appraisers.*

Entered and Filed August 2nd, 1916.

This day the libellant moved for the appointment of appraisers and for the delivery of the vessel to it on appeal, which motion was resisted by the respondents, and thereupon the court, being of opinion that an appraisement of the said steamer should be had for the



purpose of informing the court approximately of the value of the vessel as bearing upon the question of bonds to be required in the case from either party,

It Is Ordered, that Homer L. Ferguson, R. M. Watt and Robert S. Haight be, and they are hereby, appointed as appraisers and instructed to ascertain the fair value of the steamer Appam, taking into consideration her condition, her general design and construction and the state of the market after such examination and inquiry as they, the said appraisers, may deem expedient, and it is further ordered that the said appraisers make report of their finding in writing to the court.

EDMUND WADDILL, JR.,  
U. S. Dist. Judge.

August 2nd, 1916.

183      *Report of Appraisers of Value of Steamship Appam.*

Filed in Open Court, August 7th, 1916.

To the Honorable Edmund Waddill, Jr., Judge U. S. District Court:

We the undersigned appraisers, appointed by your Honor to appraise the S. S. "Appam," her engines, boilers, machinery, tackle, apparel, furniture and appurtenances, having duly met on board said steamship and made careful examination of her as she now lies at anchor at Newport News, do report that we find the present value of said steamship, her engines, boilers, machinery, tackle, apparel, furniture and appurtenances to be One Million, Two Hundred and Fifty Thousand (\$1,250,000.00) Dollars.

Respectfully submitted,

H. L. FERGUSON,  
R. M. WATT,  
ROBT. S. HAIGHT,  
*Appraisers.*

184

*Final Decree.*

Entered and Filed August 8th, 1916.

This cause came on to be heard on May 12, 1916, whereupon respondents moved for a postponement on the grounds stated in the affidavit of Hans Berg, and exhibits filed therewith, which motion was overruled by the court, to which respondents excepted:

And thereupon the cause came on to be heard upon the pleadings and proofs, and was argued by counsel; and the court, not being fully advised in the premises, took time to consider thereof;

And now the court, being of opinion, for reasons stated in writing and filed herewith as part hereof, that it has jurisdiction in the premises, and that libellant is entitled to have restitution of the steamship Appam, and to have possession thereof restored to it, doth so decree, and doth order and adjudge that the exceptions and pleas

of respondents to the jurisdiction be and the same are hereby overruled, and that the marshal of this District do deliver to libellant the possession of the steamship Appam, her tackle, apparel, furniture, engines, boilers, machinery and appurtenances, as of the 29th day of July, 1916, on which date the opinion of the court was rendered and filed.

And it is further ordered that the libellant do recover of and from the respondents the costs of the court, to be forthwith taxed by the Clerk;

And the petition for appeal and assignment of errors  
185 having this 8th day of August, 1916, been presented to the court, praying the allowance of an appeal and supersedeas to this decree, and praying also that a transcript of the record in the cause may be sent up to the Supreme Court of the United States, and praying also for other relief, an appeal is hereby allowed in open court, bond to be given in the penalty of \$2,000,000, the same to operate as a supersedeas, staying all further proceedings in the execution of this decree, said bond to be executed with surety, to be approved by this court, or a judge thereof, and payable and conditioned that the respondents shall prosecute their appeal to effect, and if they fail to make their plea good, shall answer all damages and costs.

And it is further ordered that if the respondents shall, within five days after the entry of this decree, perfect their appeal and give the security hereinbefore provided, then the said steamship Appam, her tackle, etc., shall be held in the custody of the Marshal of this District, pending such appeal, subject to all orders of this court looking to her proper care and preservation.

And it is further ordered that, pending such appeal, the respondents do advance to the Marshal of this District, in cash, monthly, all costs and expenses attending the keeping of the said steamship in the custody of the said Marshal, including all expenditures that may be necessary in the discretion of the Marshal, subject to the supervision of the court, to keep said steamship in good condition and to prevent her from deteriorating while in said custody.

EDMUND WADDILL, JR.,  
U. S. Dist. Judge.

Norfolk, Va., August 8th, 1916.

186 *Note of Libellant's Motion to Release the Steamship  
"Appam," etc.*

Prior to the signing of the final decree, and after the filing of the report of the appraisers, the libellant moved in open Court to have the Steamship "Appam" released from the custody of the Marshal and delivered to the libellant, offering to give bond in such amount and with such security as the Court should require, and conditioned according to law and the rules of Court, which motion was denied by the Court, and thereupon the libellant took exception to said action of the Court.

187

*Petition for Appeal.*

Filed August 8th, 1916.

The claimants and respondents, H. Berg, Prize-master, and L. M. von Schilling, German Vice-Consul, considering themselves aggrieved by the final decree of the district Court made and entered on August 8, A. D. 1916, hereby appeal from the whole of said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors herewith filed, and pray that this appeal may be allowed, and that the said decree may be suspended during the pendency of this appeal; that a transcript of the record on appeal may be sent to the Supreme Court of the United States, and that said decree may be reviewed and reversed by said Court, and that respondents and claimants may have such other and further relief as the nature of the case may require.

HANS BERG, *Prize-master,*L. M. VON SCHILLING, *Vice-Consul,*

By FREDERICK W. LEHMANN,

ROBT. M. HUGHES,

JOHN W. CLIFTON,

NORVIN R. LINDHEIM,

*Proctors.*

Norfolk, Va., August 8, 1916.

188

*Assignment of Errors.*

Filed August 8th, 1916.

The claimants and respondents assign the following errors:

1. The court erred in holding that the treaties between Germany and the United States had no application to this case.

2. The court erred in holding that the Prize-master and crew of the Appam were not entitled under the provisions of said treaties to enter the harbor of Hampton Roads and lay up there, or remain there for the time shown by the record in this case, with said steamer, a lawful prize of war, without being subject to restitution to her former owners.

3. The court erred in denying the exemption of said prize while in said port from being arrested, searched or put under legal process, as provided in said treaties.

4. The court erred in holding that under the general principles of the law of nations the act of the prize-master and crew in bringing their said prize into said port under a bona fide claim of a treaty right, and remaining there under the circumstances shown in this case, constituted such a violation of the neutrality of this country as entitled the former owner of said prize to a restitution of said prize by a decree of court.

5. The court erred in holding that it had jurisdiction to decree restitution under the circumstances shown in the case.

6. The court erred in holding that the title of the captor as against the former owner was not complete till formal condemnation.

7. The court erred in denying respondents' motion for a postponement till the close of the prize proceedings in Germany and reasonable opportunity to secure and file a complete record thereof; and to take testimony in Germany on commission; and in holding that the proceedings in this case were not affected by reason of said proceedings.

8. The court erred in entering a final decree in favor of libellant and in not dismissing the libel with costs.

HANS BERG, *Prizemaster.*

L. M. VON SCHILLING,

*Vice-Consul,*

By FREDERICK W. LEHMANN

ROBT. M. HUGHES,

JNO. W. CLIFTON,

NORVIN R. LINDHEIM,

*Proctors.*

Norfolk, Va., August 8th, 1916.

190

*Appeal and Supersedeas Bond.*

Executed, Approved and Filed in Open Court on August 8th, 1916.

Know all men by these presents, that we, Hans Berg, Prize Master, and L. M. Von Schilling, German Vice-Consul, Respondents and Claimants in this cause, as principals, and The American Surety Company of New York, Fidelity & Deposit Company of Maryland, Maryland Casualty Company, National Surety Company of New York, and United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto the British & African Steam Navigation Company, Limited, in the just and full sum of Two Million Dollars (\$2,000,000.), to which payment well and truly to be made, the said Hans Berg, Prize Master and L. M. Von Schilling, German Vice-Counsel, as principals and the sureties do hereby bind themselves and their and each of their executors, administrators, successors and assigns, firmly by these presents as follows:

Said Hans Berg and L. M. Von Schilling to be held and bound for the amount of said sum of Two Million Dollars (\$2,000,000.) and each of the said sureties to be held and bound as follows:

The said American Surety Company of New York for the sum of Six Hundred Thousand Dollars (\$600,000.), the said Fidelity & Deposit Company of Maryland for the sum of Four Hundred Fifty Thousand Dollars (\$450,000.), the said Maryland Casualty Company for the sum of One Hundred Eighty Thousand Dollars (\$180,000.), the said United States Fidelity & Guaranty Company for the sum of Three Hundred Twenty Thousand Dollars (\$320,000.), the said National Surety Company in the sum of Four Hundred Fifty  
191 Thousand Dollars (\$450,000.).

Sealed with our seals and dated this 8th day of August,  
1916.

Whereas on this day in the above entitled cause a final decree has been entered in favor of libellant and an appeal therefrom in open court has been prayed, and a clause therein provides that the execution of the said decree is suspended on executing an appeal bond,

Now, the condition of this obligation is such that if the above named claimants and respondents shall prosecute their appeal to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

HANS BERG, [SEAL.]

L. M. VON SCHILLING, [SEAL.]

AMERICAN SURETY COMPANY OF [SEAL.]

NEW YORK, [SEAL.]

By MENALCUS LANKFORD,  
*Resident Vice-President.*

Attest:

L. T. DOBIE,  
*Resident Ass't Sec'y.*

FIDELITY & DEPOSIT COMPANY OF  
MARYLAND, [SEAL.]

By LOWERY D. FINLEY,  
*Att'y-in-fact.*

MARYLAND CASUALTY COMPANY, [SEAL.]

By MICHAEL H. JUSTICE, JR.,  
*Att'y in fact.*

NATIONAL SURETY COMPANY, [SEAL.]

By A. B. CARR,  
*Attorney in fact.*

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY, [SEAL.]

By CHARLES G. METTS,  
*Attorney in fact.*

Approved, in open Court, August 8, 1916.,

EDMUND WADDILL, JR.,  
*U. S. Dist. Judge.*

192 *Stipulation of Proctors as to What Record on Appeal Shall  
Consist Of.*

Filed ———.

It is agreed that the record of this case on appeal shall consist of the following:

Libel.

Claim, Plea and Answer.

Amended Libel, and order allowing same to be filed.

Suggestion of U. S. Attorney, March 7, 1916.

Suggestion of U. S. Attorney, March 20, 1916.



Exceptions, Plea and Answer to Amended Libel.

Order of March 20, 1916, setting case for trial.

Report of Marsden as surveyor, and order of appointment.

Affidavit of Berg and exhibits therewith as to postponement.

Libellant's evidence as follows:

Letter of Secretary Lansing handed by Court to counsel and offered in evidence by libellant over objection of respondents as privileged and as not evidence.

William Dennitt's testimony.

193 (Charts, manifest to be certified up as originals.)

G. P. Ashburner's testimony and exhibits.

Henry G. Harrison's testimony.

A. G. Bailey's testimony.

(In order to obviate inserting the documentary proofs of title, it is admitted that the libellant was at the time of the "Appam's" capture a corporation duly organized under the laws of the Kingdom of Great Britain and Ireland, and the owner of the said steamer.)

The Answers to Interrogatories and translation.

(Libellant offered Art. 111 of the German Prize Code as set out in his amended libel, but the court held it inadmissible, to which libellant excepted.)

Respondent's evidence as follows:

(Over objections of libellant).

(a) The commission of Count Dohna and translation attached.

(b) The extract from the Naval Register and translation attached.

(c) The commission of Lieutenant Berg and a translation attached.

(d) The certificate as to the pendency of the Prize proceedings and a translation attached.

(e) The reply of the German Embassy to Secretary Lansing's letter and his reply thereto, the court stating that the Secretary had consented to their introduction.

194 (f) The letter of John Adams, Benjamin Franklin and Thomas Jefferson as copied in folio 148.

It was agreed that the documentary evidence offered by both sides should be considered as properly certified, and that the certificate be not copied in the record; both sides reserving all other objections.

The Order of Appraisement.

The Appraisement.

The Final Decree and Opinion.

The Petition for Appeal.

The Assignment of Errors.

The allowance of Appeal.

The Bond.

This agreement.

The Order to transmit Record.

The Certificate.

HUGHES & VANDEVENTER,

*Proctors for Libellant.*

HUGHES, LITTLE & SEAWELL,

*Proctors for Respondents.*

195

*Order to Transmit Record.*

Thereupon, it is ordered by the court here that a transcript of the record and proceedings in the foregoing cause, with all things thereunto relating, as stipulated by proctors of record hereinbefore, be transmitted to the Supreme Court of the United States, held at Washington, D. C.

And the same is transmitted accordingly.

Teste:

[Seal U. S. District Court, Eastern Dist. of Virginia.]

JOSEPH P. BRADY, *Clerk*,  
By D. ARTHUR KELSEY,  
*Deputy Clerk*.

196

*Certificate of Clerk.*

UNITED STATES OF AMERICA,  
*Eastern District of Virginia, To-wit:*

I, Joseph P. Brady, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true record of the proceedings and judgment of the said Court, as stipulated by proctors of record, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, at Norfolk, in said district, this 25th. day of August, 1916.

[Seal U. S. District Court, Eastern Dist. of Virginia.]

JOSEPH P. BRADY, *Clerk*,  
By D. ARTHUR KELSEY,  
*Deputy Clerk*.

Costs of Court paid by Appellants.

Endorsed on cover: File No. 25,480. E. Virginia D. C. U. S. Term No. 650. Hans Berg, Prize Master in charge of the prize ship "Appam," and L. Von Schilling, Vice Consul of the German Empire, appellants, vs. British & African Steam Navigation Company. Filed September 5th, 1916. File No. 25,480.

Office Supreme Court, U. S.

FILED

NOV 20 1916

JAMES D. MAHER

CLERK

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# Supreme Court of the United States

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OCTOBER TERM, 1916.

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No. 650.

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HANS BERG, prize master in charge of the prize ship "Appam"  
and L. M. VON SCHILLING, Vice-Consul of the German  
Empire,

*Appellants,*

*vs.*

BRITISH & AFRICAN STEAM NAVIGATION COMPANY,  
Limited.

---

## MOTION TO ADVANCE.

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FREDERIC R. COUDERT,  
HOWARD THAYER KINGSBURY,  
RALPH JAMES M. BULLOWA,  
*Counsel for Appellee.*

# Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 650.

HANS BERG, Prize Master in  
charge of the Prize Ship  
"APPAM" and L. M. VON  
SCHILLING, Vice-Consul of the  
German Empire,  
Appellants,

VS.

BRITISH & AFRICAN STEAM NAVI-  
GATION COMPANY, LIMITED.

Now comes the British & African Steam Navigation Company, Limited, the appellee above named, by its counsel Frederic R. Coudert, Howard Thayer Kingsbury and Ralph James M. Bullock, and moves that this cause be advanced upon the docket of this Court and set down for hearing upon some early date to be fixed by this Court, upon the following grounds:—

1. This is a suit in Admiralty by the original British owner to recover possession of the Steamship *Appam* taken as a prize upon the high seas by a German cruiser during the present War and sent under a Prize Master into an American Port with instructions there to lay her up. The District Court awarded possession to the libellant but stayed execution of the decree pending this appeal and retained the vessel in the custody of the Court upon the furnishing of security by the

4 appellants as appears by the printed Transcript of Record herein at page 95.

2. This cause involves important questions of international law and especially the question whether a naval prize may be sequestered in a neutral American port.

3. This cause involves important questions affecting the Treaty relations of the United States with the German Empire and especially the construction, application and effect of certain provisions of the Treaties of 1799 and 1828 between the United States and the Kingdom of Prussia referred to in the appellants' answer herein as ap-

5 appears at page 9 of the printed Transcript of Record.

4. The legal questions involved in this cause have a direct bearing upon the diplomatic and international relations of the United States with belligerents in the present war and it is to the public interest that these questions should be determined by this Court as speedily as possible.

Dated November 20th, 1916.

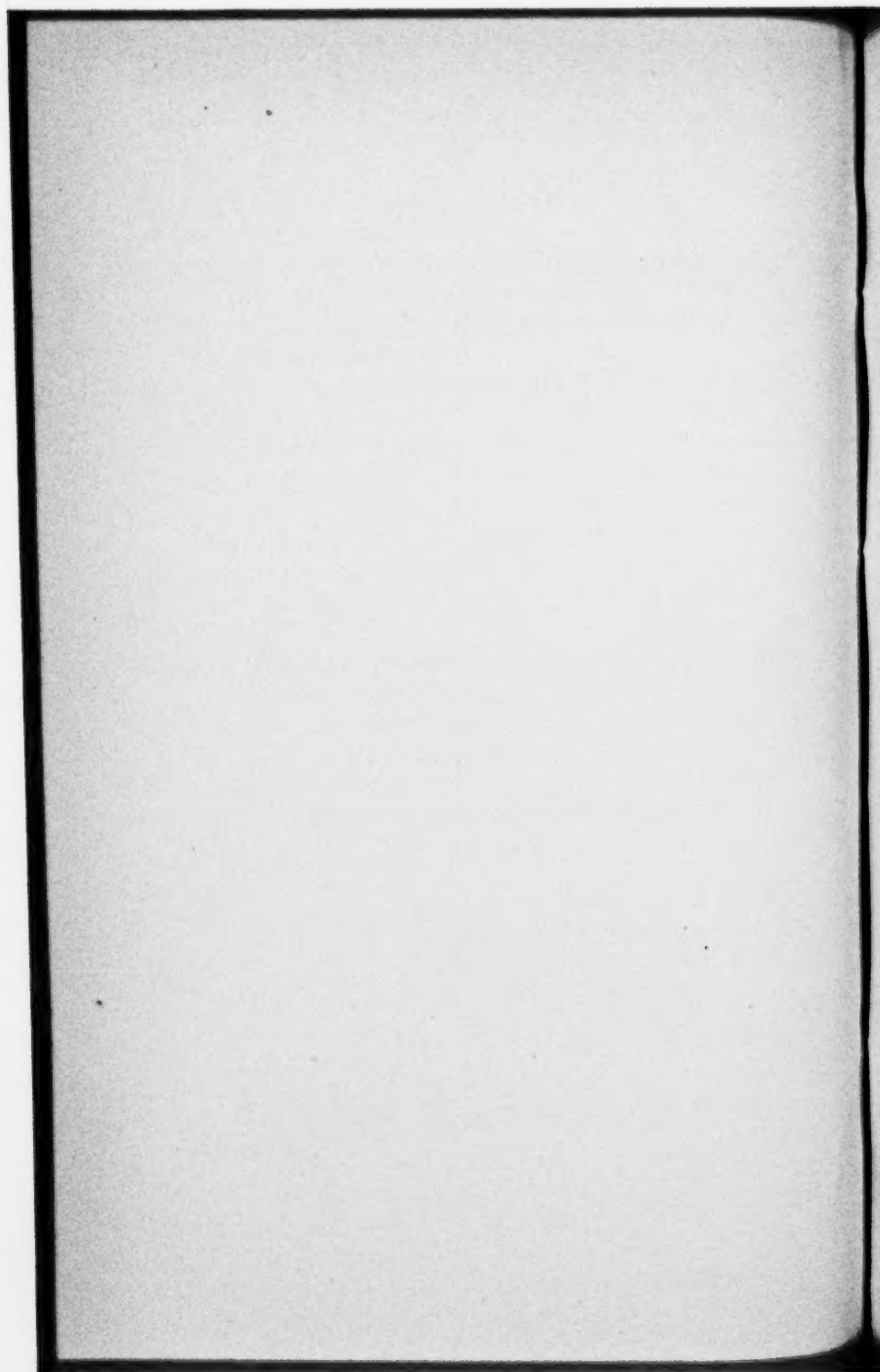
FREDERIC R. COUDERT,  
HOWARD THAYER KINGSBURY,  
RALPH JAMES M. BULLOWA,  
Counsel for Appellee.

6

The appellants above named consent to this application.

Counsel for Appellants.





Office Supreme Court, D. S.

FILED

DEC 15 1916

JAMES D. MAHER

CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1916.**

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**No. 850.**

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**HANS BERG AND L. M. VON SCHILLING, APPELLANTS,**

**vs.**

**THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY, LIMITED, APPELLEE.**

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**STATEMENT, BRIEF AND ARGUMENT FOR  
APPELLANTS.**

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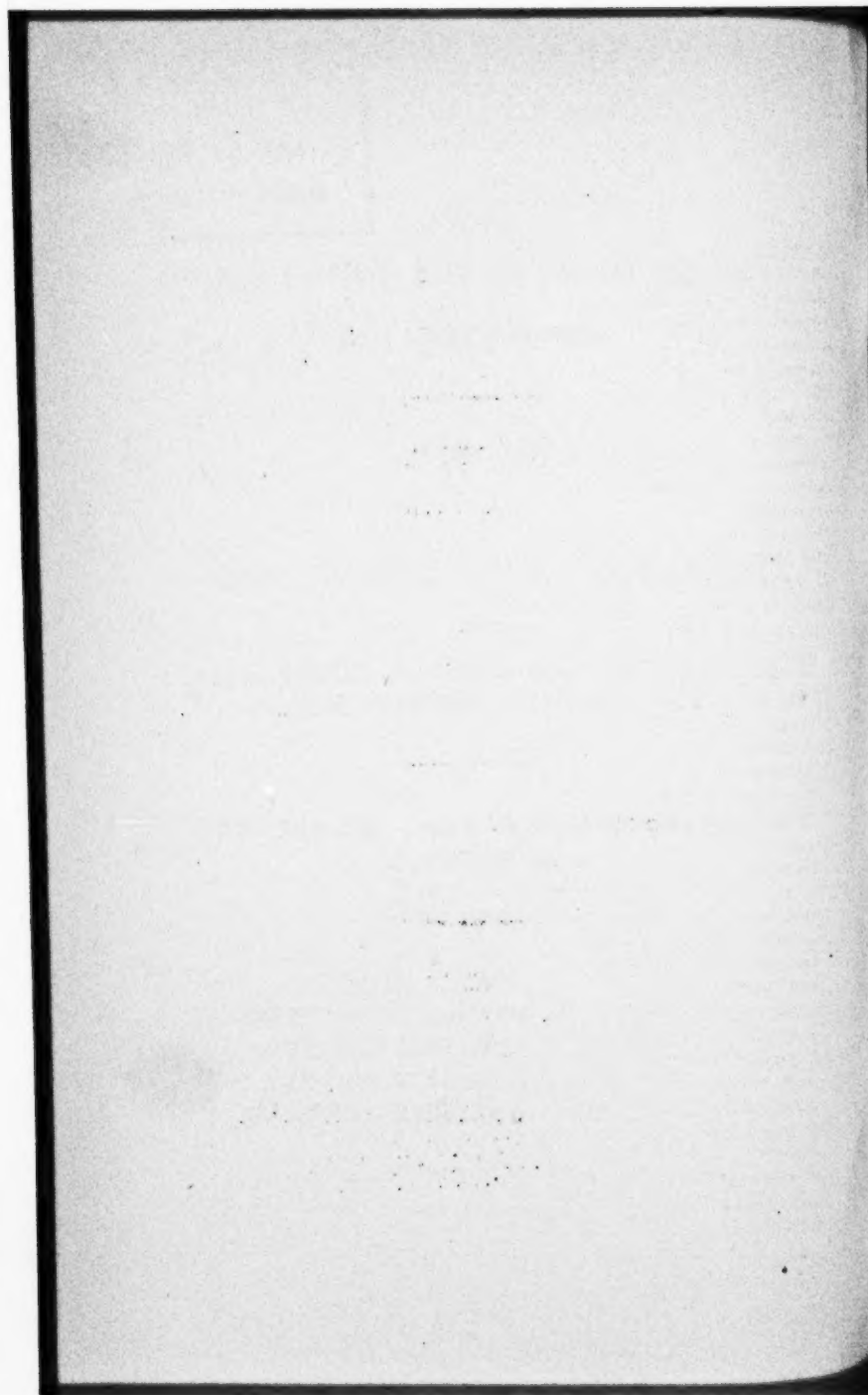
**JOHN W. CLIFTON.**

**FREDERICK W. LEHMANN.**

**NORVIN R. LINDHEIM.**

**ROBERT M. HUGHES.**

**WALTER S. PENFIELD.**



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IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1916.

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**No. 650.**

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HANS BERG AND L. M. VON SCHILLING, APPELLANTS,

*vs.*

THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY, LIMITED, APPELLEE.

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**STATEMENT, BRIEF AND ARGUMENT FOR  
APPELLANTS.**

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**Statement.**

The *Appam*, a British merchant ship owned by the British and African Steam Navigation Company, was on her way from Dakar, Africa, to Liverpool, England. She had a crew of one hundred and sixty men, and passengers to the number of one hundred and fifty, of whom twenty-two were Germans and prisoners of war. She had a cargo of merchandise, which, like the ship itself, was British owned. She carried on her stern deck a three-inch gun, manned by two gunners. On the 15th of January, 1916,

on the high seas, in latitude 33.19 north and longitude 14.24 west, she was met by the *Moewe*, a German ship of war. A shot across her bow brought her to, and an officer from the *Moewe* came aboard. He said to the captain, "I am very sorry, but I have got to take your ship from you." The captain answered, "So am I." A man from the *Moewe* was placed on the bridge and information obtained as to the passengers, the cargo, and the supply of coal; and then the captain, with some of his officers and members of his crew, were taken to the *Moewe*. The ships remained in close company for two days. Then the officers and members of the *Appam* crew, together with the crews of six ships previously captured by the *Moewe*, were sent aboard the *Appam*, making about five hundred altogether. Hans Berg, an officer of the *Moewe* and of the German Naval Reserve, with a prize crew of twenty-two men and nineteen of the German prisoners, who were freed by the capture of the *Appam*, now took charge of the *Appam*, under a commission from the commander of the *Moewe*, as follows:

*"Information for the American Authorities.*

"The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer *Appam*, and has orders to bring the ship into the nearest American harbor and there to lay up.

"KOMMANDO S. M. H. MOEWE.

"COUNT ZU DOHNA,

*"Cruiser Captain and Commander.*

"(Imperial Navy Stamp.)

"Kommando S. M. H. Moewe."

Bombs had been placed on the *Appam* at different places, at the bow, the stern, in the engine and chart rooms, and on the bridge. Lieutenant Berg called the attention

of the *Appam's* captain to these bombs, and said to him, "if there is any trouble, mutiny, or attempt to take the ship, I have my orders to blow her up instantly \* \* \* I do not want to use them (the bombs), but shall be compelled to if there is any trouble." The chief engineer was told that he and his crew must obey orders of the Germans in charge, under penalty of death for disobedience, while, in case of obedience, not a hair on the head of any of them would be harmed. The officers and crew of the *Appam* submitted entirely to the German control, operating the ship under the orders given them, while the Germans navigated her and kept guard.

And so she sailed westward, passing out of view of the *Moewe* and out of communication with her on the 23d, until February 1, when she came into Hampton Roads with the German colors flying.

There was at no time any attempt at mutiny or recapture. Of his treatment by Berg, the British captain said, "I have no complaint to make."

The distance from the place of capture to the nearest German port, that of Emden, is 1,590 miles, and to Norfolk 3,051 miles. But the approach to all German ports was dangerous, because of the presence of British and French ships of war, and also of floating mines, and to reach them it would be necessary to sail around the British Islands and through the North Sea (Record, 26-31).

On coming into port the British prisoners were all released and the *Appam* continued at anchor in Newport News.

On the 11th day of February prize proceedings were begun in the German prize court at Hamburg.

On the 16th day of February the present suit was instituted on the instance side of the district court at Norfolk.

### The Libel

alleged the corporate character of the libellant as a corporation duly organized under the laws of Great Britain and Ireland, ownership of the steamship *Appam*, then lying at Newport News, and wrongful detention of the ship by Hans Berg and others to the libellant unknown. It alleged further that the *Appam* sailed from Dakar, Africa, on January 11, 1916, for Liverpool, and on the 16th day of that month was unlawfully seized by persons unknown to libellant, and thereafter, under compulsion, was forced to proceed, with passengers, crew, and cargo, to Hampton Roads, arriving there February 1, 1916, and was then removed to Newport News, where she still lies. The libel prayed for due process against the ship, and for a decree of restitution to the libellant (Record, 1-2).

### The Claim, Plea, and Answer

of Hans Berg, master in charge of the prize ship *Appam*, and L. M. von Schilling, Vice Consul of the German Empire for the district comprising Newport News, Norfolk, Portsmouth, and contiguous waters, made claim to the ship, as the property of the German Empire, and averred that they were duly authorized by the German Empire to make the claim, and that Hans Berg was master of the prize, the steamship *Appam*, and was bailee thereof for the owner. By way of answer, they disclaimed knowledge of the corporate character of the libellant, and of its ownership of the *Appam*, at any time, and denied that the libellant was, at any time mentioned in the libel, the owner of the *Appam* or had possession and use of her as owner. They further denied wrongful withholding of the ship by Berg and persons unknown, disclaimed knowledge of when or whence the *Appam* had sailed, and denied that she had been wrong-



fully seized by persons unknown to the libellant, but admitted that she had been brought into Hampton Roads, and was lying at Newport News.

Answering further and affirmatively, they said that the *Appam*, while a British vessel, was captured on the high seas, on January 15, 1916, during the existence of a state of war between Great Britain and the German Empire by the *Moewe*, a German ship of war, and so became a lawful prize of the Empire, and was placed by the commander of the *Moewe* in charge of Hans Berg, a lieutenant in the naval service of the German Empire, and a prize crew in that naval service, and was brought by them into the port of Newport News, and was held there by Berg and his crew as a lawful prize of war, belonging to and the property of the German Empire.

They further said that, by the law of nations, the title of the German Empire to the said prize could not be inquired into in these proceedings, and that by the treaties in force between that Empire and the United States and also by the law of nations, the said prize was entitled to enter the harbor of Newport News, and was exempt from any legal process of arrest, search or otherwise, and on behalf of the German Empire they protested against any action of the court, and prayed the dismissal of the libel (Record, 2-3).

#### Amendment to the Libel

was filed by the libellant, so as to confess and avoid or explain or add to the new matters set forth by the respondents Hans Berg, master, etc., and L. M. von Schilling, Vice Consul, etc., in which it was alleged upon information and belief that the German Naval Prize Code in effect since 1909 provided for bringing a prize into a German port or the port of an ally with all possible dispatch and safety; that a prize might be brought into a neutral port only if the

neutral power permitted; that it might be brought into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel and supplies; and that in the latter cases she must leave as soon as the cause justifying her entrance ceased to exist.

The libellant further alleged that the *Appam* arrived at Hampton Roads on February 1, 1916, in a seaworthy condition; that since that time she had been removed to Newport News, where she was still lying at anchor in the custody of the court; that according to the law of nations and the laws of the United States the respondents were not entitled to detain the ship at Newport News; that by so holding her until the service of process in this cause they had violated the law of nations and the laws of the United States, and that according to that law and those laws the libellant was entitled to the possession of the ship.

It was further alleged that prior to the arrival of the *Appam* at Hampton Roads and since, persons unknown to the libellant had removed portions of her cargo, in violation of the law of nations, of the laws of the United States, and the neutrality of the United States. And so the libellant prayed as in the original libel (Record, 4-5).

#### **Exceptions, Plea, and Answer to the Amended Libel**

were filed by the respondents, in which, reserving their objections to the jurisdiction of the court over the cause, they denied that the acts set out in the amended libel constituted a violation of the neutrality of the United States, and that they gave any ground for restoring possession of the ship to the libellant, even if they did violate that neutrality.

Answering specifically the amended libel, they—

1. Denied that the German Prize Code had been correctly quoted and called for strict proof, if material.

2. Alleged that when the *Appam* arrived at Hampton Roads she was not in a seaworthy condition. She was manned by a prize crew of only twenty-two men, and had on board besides, as prisoners, passengers and crew of the captured vessel, numbering about four hundred persons. She was a large steamer and required a very large crew to handle her. She was short of water, provisions and fuel, and was obliged to come into a harbor as a matter of necessity and humanity. Her machinery also needed overhauling. True, she had been removed to Newport News, but under the law of nations and the laws of the United States the respondents were entitled to hold and detain her there. The prize master had brought her into Hampton Roads in good faith, relying upon the treaty between the United States and Germany, which provides:

"The vessels of war, public and private of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. (But conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger or accident of the sea, they shall be obliged to depart as soon as possible".) Record, 9.

The parts of this treaty in parentheses lapsed and were not revived by the treaty of 1828, the existing treaty, and are no longer in force.

They further averred that in the circumstances alleged the prize master was entitled by the general principles of

international law to bring his ship into this neutral port, and that the length of his stay therein was not a matter for determination in a judicial tribunal of the United States.

3. They denied the allegations of the amended libel, which charged that portions of the cargo had been removed from the ship, and, further answering, said that proceedings had been instituted in a prize court of competent jurisdiction in Germany for the condemnation of the *Appam* and her cargo as prize of war, and that such proceedings were pending and being pressed with all possible speed, and they prayed the court to suspend all further proceedings herein until the prize cause was brought to an end and proper evidence of it brought before the court.

They repeated the prayer of their original answer (Record, 8-10).

#### Proceedings Prior to Trial.

The libellant, on March 18, 1916, moved that the cause be set down for a speedy hearing, to which the respondents objected. They asked for time, at least sixty days, to secure from Germany papers showing the character of the *Moewe* as a German man-of-war, and the commissions of Count Dohna and Hans Berg as officers of the German navy and the ship *Moewe*. To this the libellant answered, offering to admit the character of the *Moewe* as a German warship and that Count Dohna and Hans Berg were commissioned officers of the German navy (Record, 10-11).

The answer of the respondent to the amended libel, in which they asked for postponement to await the action of the prize court in Germany, was filed on March 20, and at this time the respondents renewed their motion for time to secure from Germany the commissions of Count Dohna and Hans Berg, and the libellant renewed its offer to admit the commissions of these officers.

The case was by the court set down for hearing on April 18, 1916.

A surveyor was, on April 8, appointed to examine the *Appam*, and he reported on May 13 that the vessel was in good order, save that in one of the holds there was an accumulation of several inches of water, and he recommended "that this space be cleaned out and the nature of the trouble ascertained and corrected." He reported further "that the stern gland of the port tail and shaft requires repacking, and that this should be done before the vessel again proceeds to sea" (Record, 11-13).

The case did not come on for hearing on the day set, but was postponed to May 12. On that day was filed the affidavit of Hans Berg, annexed to which were exhibits showing the efforts to get the commissions of Count Dohna and Lieutenant Berg and the record of the proceedings of the German prize court. The affidavit stated that, in addition to this documentary evidence, there was necessary to the defense the testimony of the officers of the *Moewe* who first went aboard the *Appam* and who knew what was done while the *Moewe* and the *Appam* were in company, especially as to what, if anything, was removed from the *Appam*. Berg knew nothing of what occurred aboard of her until he took charge, on the second day, when she was sent on her voyage westward (Record, 13-16).

On March 7, 1916, the United States attorney for the Eastern District of Virginia made suggestion to the court that the United States, through its Department of State, had received a communication from the German ambassador protesting against the action of the court in taking cognizance of the case and asking that the United States attorney take such steps as might be necessary to secure the dismissal of the libel.

The attorney stated that in making the suggestion the United States does not intervene as an interested party, but presents the suggestion as *amicus curiæ* and as a matter



of comity between the United States and the German Government (Record, 5-7).

### The Trial

was begun on May 12 and was concluded on the 16th of the same month.

The evidence introduced by the libellant showed the facts of the capture and the bringing of the ship to Hampton Roads, as already set forth in this statement. And there was testimony to the effect that some specie, part of the cargo of the *Appam*, was taken aboard the *Moewe*. There was no evidence that any other part of the cargo was taken from the ship at any time. The appointment of Hans Berg as prize master by Count Dohna was put in evidence by the libellant, it being in answer to an interrogatory propounded by libellant, which interrogatory and answer were offered as an admission by the respondent. The captain and chief engineer of the *Appam* testified that she was seaworthy when she arrived at Hampton Roads, and there was testimony that she could have been supplied with food and fuel sufficient to serve for a voyage to a port on the west coast of Europe within thirty or forty-eight hours (Record, 20-62).

The libellant also offered, and the court admitted, in evidence a letter of the Hon. Robert Lansing, Secretary of State, dated March 2, 1916, in reply to one from Count von Bernstorff, the German Ambassador, of date February 2, 1916, in which the Secretary gives his view of Article XIX of the treaty of 1799 between the United States and Prussia.

He declines to instruct the United States attorney to appear in the case and secure a dismissal of the libel, and takes the position that whether in the circumstances "the United States court has properly or improperly assumed jurisdiction of the case and taken custody of the ship, is a

legal question, which, according to American practice, must now be decided by the municipal courts of this country" (Record, 17-19).

The respondents offered in evidence the commission of Lieutenant Commander Dohna as captain of corvette and the commission of Hans Berg as an officer of the German Naval Reserve; also the authenticated certificate of the director of the Hamburg County Court, "that the prize proceedings re the English steamer *Appam*, captured by the German auxiliary cruiser *Moewe*, are pending since February 11, 1916 (Record, 62-69).

Also the answer, dated March 16, 1916, of the German Ambassador to the letter of the Secretary of State of date March 2, and the reply to this answer by the Secretary of State of date April 7 (Record, 70-75), and an extract from the diplomatic correspondence of Adams, Franklin, and Jefferson, taken from Wharton's\* Diplomatic Correspondence of the United States, volume 1, page 599 (Record, 75).

All this testimony thus offered by the respondents was objected to by the libellant and admitted by the court over such objection.

The libellant offered in evidence sections 110 and 111 of the German Prize Code, but these were excluded by the court (Record, 75-76).

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\* There are two publications of the Diplomatic Correspondence of the United States during the American Revolution, referred to in the brief and argument. One is edited by Wharton and the other by Sparks. The edition referred to will be indicated in the citation. In addition, there is a publication of the Diplomatic Correspondence of the United States from 1783 to 1789. This will be cited as "Diplomatic Correspondence of the United States." Where the American State Papers are cited the reference is to the six-volume edition, edited by Walter Lowrie and Matthew St. Clair Clark, and published in Washington, 1832.

### The Opinion of the Court

discusses the case elaborately and the conclusion is—

"That the manner of bringing the *Appam* into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize proceedings of the court of the Imperial Government of the German Empire; and it will be so ordered" (Record, 93).

### The Decree of the Court

accordingly directed the marshal to deliver possession of the *Appam* to the libellant, but granted a supersedeas, conditioned upon filing a bond in the penalty of \$2,000,000, which condition was complied with (Record, 94-95).

From this decree the respondents in open court prayed and were allowed an appeal, and submitted therewith the following

### Assignment of Errors.

"1. The court erred in holding that the treaties between Germany and the United States had no application to this case.

"2. The court erred in holding that the prize-master and crew of the *Appam* were not entitled

under the provisions of said treaties to enter the harbor of Hampton Roads and lay up there, or remain there for the time shown by the record in this case, with said steamer, a lawful prize of war, without being subject to restitution to her former owners.

"3. The court erred in denying the exemption of said prize while in said port from being arrested, searched or put under legal process, as provided in said treaties.

"4. The court erred in holding that under the general principles of the law of nations the act of the prize-master and crew in bringing their said prize into said port under a *bona fide* claim of a treaty right, and remaining there under the circumstances shown in this case, constituted such a violation of the neutrality of this country as entitled the former owner of said prize to a restitution of said prize by a decree of court.

"5. The court erred in holding that it had jurisdiction to decree restitution under the circumstances shown in the case.

"6. The court erred in holding that the title of the captors as against the former owner was not complete till formal condemnation.

"7. The court erred in denying respondents' motion for a postponement till the close of the prize proceedings in Germany and reasonable opportunity to secure and file a complete record thereof; and to take testimony in Germany on commission; and in holding that the proceedings in this case were not affected by reason of said proceedings.

"8. The court erred in entering a final decree in favor of libellant and in not dismissing the libel with costs" (Record, 96, 97).

## Points and Authorities.

## I.

THE AUTHORITY OF COUNT ZU DOHNA AND HANS BERG, AS OFFICERS OF THE GERMAN NAVY, IS CONCEDED BY THE PLEADINGS, AND IS OTHERWISE FULLY SHOWN BY ADMISSIONS IN THE RECORD AND THE TESTIMONY.

## II.

AN ACTUAL CAPTURE OF THE APPAM BY THE MOEWE AND SUBMISSION TO THE CAPTURE BY THE OFFICERS AND CREW OF THE APPAM IS SHOWN BEYOND QUESTION BY THE PLEADINGS AND THE TESTIMONY.

*The Alexander*, 1 Fed. Cas., 357.

*The Alexander*, 8 Cranch, 169.

*The Brig. Short Staple*, 9 Cranch, 55.

## III.

THERE WAS NO ABANDONMENT OF THE PRIZE BY THE CAPTORS.

*McDonough vs. Dannery*, 3 Dall., 188.

## IV.

THE CAPTURE OF THE APPAM WAS A LAWFUL ACT OF WAR, AND VESTED THE PROPERTY IN THE SHIP IN THE GERMAN EMPIRE, AS BETWEEN THE PARTIES TO THIS SUIT.

*McDonough vs. Dannery*, 3 Dall., 188.

*The Adventure*, 8 Cranch, 221.

*The Adeline*, 9 Cranch, 244.

*The Astrea*, 1 Wheat., 125.

*The Josefa Segunda*, 5 Wheat., 338.

*The Sally Magee*, 3 Wall., 451.



*The Nassau*, 4 Wall., 634; 17 Fed. Cases, 1180.  
*Commodore Stewart's Case*, 1 Ct. of Claims, 113.  
*The Manila Prize Cases*, 188 U. S., 254.  
*Westlake's International Law* (2d ed.), vol. 11, p. 309.  
*Wheaton's Maritime Captures and Prizes*, 259.  
*Dipl. Corr. of Dept. of State, European War*, No. 2,  
 page 140.  
*Hudson vs. Guestier*, 4 Cranch, 293.

## V.

JURISDICTION OF PRIZE CASES IS VESTED EXCLUSIVELY  
 IN THE COURTS OF THE CAPTOR GOVERNMENT.

1 *Amer. State Papers*, 660.  
*The Alerta*, 9 Cranch, 359.  
*The Invincible*, 1 Wheat., 238.  
*The Divina Pastora*, 4 Wheat., 52.  
*The Estrella*, 4 Wheat., 298.  
*Jecker vs. Montgomery*, 13 How., 498.

## VI.

IT IS NOT ESSENTIAL TO THE JURISDICTION OF THE  
 COURTS OF THE CAPTOR COUNTRY THAT THE PRIZE BE  
 BROUGHT INTO ONE OF ITS PORTS.

*Hudson vs. Guestier*, 4 Cranch, 293.  
*Jecker vs. Montgomery*, 13 How., 498.

## VII.

THE COURTS OF A NEUTRAL COUNTRY, AS TO A VESSEL  
 WITHIN THEIR JURISDICTION, MAY INQUIRE WHETHER IT  
 IS HELD A PRIZE OF WAR OR WHETHER HER TAKING WAS  
 A VIOLATION OF THE NEUTRALITY OF THEIR COUNTRY.

*The Alerta*, 9 Cranch, 359.  
*Glass vs. The Betsey*, 3 Dall., 6.

*The Invincible*, 13 Fed. Cas., 72.

*The Invincible*, 1 Wheat., 238.

### VIII.

BRINGING THE APPAM INTO OUR WATERS DID NOT AUTHORIZE RESTITUTION TO THE ORIGINAL BRITISH OWNERS.

*4th Jefferson's Works*, p. 78 (ed. H. A. Washington).

*1st Am. State Papers*, 21.

*Talbot vs. Jansen*, 3 Dall., 133.

*The Alerta*, 9 Cranch, 359.

*The Invincible*, 1 Wheat., 238.

*The Divina Pastora*, 4 Wheat., 52.

*The Estrella*, 4 Wheat., 298.

*The Neustra Senora de la Caridad*, 4 Wheat., 497.

*The Amistad De Rues*, 5 Wheat., 385.

*The Conception*, 6 Wheat., 235.

*Santissima Trinidad*, 7 Wheat., 283.

*Gran Para*, 7 Wheat., 471.

*Santa Maria*, 7 Wheat., 490.

*Monte Allegre*, 7 Wheat., 520.

*The Anne*, 3 Wheat., 435.

*Sir William Peel*, 5 Wall., 517.

*The Adela*, 6 Wall., 266.

*The Florida*, 101 U. S., 37.

*Queen vs. The Chesapeake*, 1 Oldright, 797.

*Williams vs. Armroyd*, 7 Cranch, 423.

### IX.

THE APPAM IS A PUBLIC SHIP OF THE GERMAN EMPIRE, AND IS ENTITLED TO ALL THE RIGHTS AND IMMUNITIES OF SUCH A SHIP.

*Hall's International Law*, 5th ed., 161.

*Dip'l. Corr., Dep't of State, European War*, No. 2, pp. 18, 19.

- The Exchange*, 7 Cranch, 116.  
*Briggs vs. Light Boats*, 11 Allen, 157.  
*The Parlement Belge*, Law Reports, 5 Probate Div., 197.  
 7 *Diplomatic Corr. of U. S.*, 288, 341, 362.  
 3 *Whart. Dip. Corr. of the Amer. Rev.*, 433.  
*Moore's Int. Law Digest*, vol. VII, p. 982, 983.  
 1 *Am. State Papers For. Rel.*, 176.  
 4 *Jefferson's Works*, 65 (ed. H. A. Washington).  
 6 *Jefferson's Works* (Monticello Edition), p. 414.  
 7 *Op. Att'y General*, 122.  
*Semmes' Service Afloat*, 663, 741, 743.

## X.

THE PRIZE-MASTER WAS AUTHORIZED BY THE TREATY EXISTING BETWEEN THE UNITED STATES AND GERMANY TO BRING HIS PRIZE INTO OUR PORT.

- Treaties, Conventions, etc., between the United States and other powers* (1776-1909), compiled by William M. Malloy, vol. I, pp. 474, 604, vol. II, pp. 1238, 1239, 1483, 1492, 1493, 1499, 1500, 1501, 1732.  
*The Alexander*, 8 Cranch., 169.  
*The Eleanor*, 2 Wheaton, 345.  
*The Felicity*, 2 Dods., 281; S. C. 2 Roscoe's Prize Cases, 233.  
 7 *Franklin's Works*, 397 (Edition John Bigelow).  
 2 *Dip. Corr. of the U. S.*, 196, 276, 304.  
 7 *Dip. Corr. of the U. S.*, 294, 362, 364.  
 6 *U. S. Stat.*, L. 61.  
 1 *Spark's Dip. Corr. of the Am. Revolution*, 361.  
 2 *Jefferson's Works*, p. 13 (Ed. H. A. Washington).  
*Vattel*, Book II, Ch. 17, Sec. 287.  
*Hauenstein vs. Lynham*, 100 U. S., 483.  
*Tucker vs. Alexandroff*, 183 U. S., 424.  
*Senate Reports*, 63; 29th Congress, 2d Session, p. 5.

- 1 *Am. State Papers, Foreign Relations*, 140.  
 6 *Jefferson's Works*, 223, 329, 351 *et seq.*, 370, 383, 423, 444 (Ed. P. L. Ford).  
*Richardson, Messages of the Presidents*, vol. 1, p. 139.  
*Solderondo vs. The Nostra Signora*, 21 Fed. Cases, 225.  
*Reid vs. The Vere*, 20 Fed. Cases, 488.  
 3 *Wharton, Int. Law Digest*, 527.  
 8 *Works of John Adams*, 183, 191, 193 (Ed. Charles Francis Adams).  
 2 *Wharton, Dip. Corr. of the Revolution*, 322, 472.  
 2 *Sparks, Dip. Corr. of the Am. Revolution*, 88.  
 9 *Writings of Washington* (Sparks' Ed.), 182-183.  
 5 *Hamilton's Works*, 113 (Ed. Henry Cabot Lodge).  
*Dip. Corr. of the Dept. of State, European War*, No. 3, p. 341 *et seq.*  
*Foreign Relations of the U. S.:*  
     (1870) pp. 216-217, 194.  
     (1871) pp. 403, 407.  
     (1883) p. 369.  
     (1885) p. 444.  
     (1887) p. 370.  
     (1896) p. 192.  
*Niemeyer, Urkundbuch zum Seekriegsrecht*, part 2, vol. I, p. 22, s. c; *Huberich and King's German Prize Code*, p. xxiii.  
*Dip. Corr. Dept. of State, European War*, No. 1, p. 77.  
*Dip. Corr. Dept. of State, European War*, No. 2, pp. 185-189.  
*Disconto Gesellschaft vs. Umbreit*, 208 U. S., 570.  
*Terlinden vs. Ames*, 184 U. S., 270.

## XI.

THE MUNICIPAL LAW OF THE UNITED STATES IS IN ACCORD  
 WITH INTERNATIONAL LAW AS IT HAS BEEN DECLARED BY  
 THIS COURT.

35 U. S. Statutes at Large, 1090, 1091.

*Fenwick in the Neutrality Laws of the United States,*  
Ch. II, page 26.

1 *Am. State Papers*, 140.

## XII.

THE NEUTRALITY PROCLAMATIONS OF THE UNITED STATES ARE IN ACCORD WITH ITS MUNICIPAL LAW AND WITH GENERAL INTERNATIONAL LAW. HAVING FAILED TO INTERDICT THE ENTRANCE OF PRIZES INTO OUR PORTS, PERMISSION TO ENTER MUST BE ASSUMED.

*Montague Bernard's Neutrality of Great Britain during the American Civil War* (London, 1870), pp. 133, 145 et seq.

7 *Op. Atty. Genl.*, 122

7 *Moore's Dig.* 982.

*Travers Twiss' Law of Nations*, 2nd ed., vol. II, pp. 453, 454.

*Hall on International Law*, 5th ed., p. 618.

*Halleck on International Law*, 1st ed., p. 523.

*Calvo: Le Droit International Theorique et Pratique*, 3rd ed., (1880), vol. III, p. 498.

*The Exchange*, 7 Cranch., 116.

## XIII.

THE QUESTIONS AT ISSUE ARE NOT AFFECTED BY THE PROVISIONS OF THE HAGUE CONVENTION.

*Scott's The Hague Peace Conferences of 1899 and 1907*, vol. II, pp. 507, 517, 519.

*Scott's The Texts of the Peace Conferences at the Hague, 1899 and 1907*, Introduction, pp. IX, X, XIX.

*Dipl. Corr., Dept. of State, European War. No. 2*, p. 140.



*Moore's Dig.*, vol. VII, p. 982.

*Twiss' Law of Nations*, 2nd ed., vol. II, pp. 453, 454.

*Wheaton's International Law*, 5th English Ed., 1916, p. 695.

*Hauteville's Nations Neutres*, vol. I, pp. 351, 352.

*Halleck's International Law*, 1st ed., p. 523.

*Calvo: Le Droit International Theorique et Pratique*, 3rd ed. (1880), vol. III, p. 498.

*Upton: Maritime Warfare and Prize*, p. 234.

#### XIV.

#### IN CONCLUSION.

#### ARGUMENT.

We have set out the pleadings, proceedings, and evidence in the case at some length in order to present it fully and fairly, but the controversy lies within a small compass and is really one of law upon indisputable facts.

The libellant was the owner of the *Appam* at the time of the capture. The ship was taken as a prize of war by a German cruiser, and by order of the captor was brought into an American port, but this, we insist, gives no right of restitution to the original owner.

#### I.

#### THE AUTHORITY OF THE CAPTORS.

That in January of this year there was a state of war between Great Britain and Germany is a fact which the world knows too well and of which the court will take judicial notice. Under the laws of war, not only the warships of each nation are subject to capture by the warships of the other, but the merchant ships of their subjects, although not carrying contraband articles of any kind, are also subject to capture.

The *Appam* was a British ship. This is the first averment of the libel and is denied by no one. The *Moewe* was a German ship of war. This is alleged in the answer and is nowhere denied. Count Dohna was a corvette captain, and Hans Berg a lieutenant, of the German navy. The official character of Hans Berg is alleged in the answer and is not denied. But his and the official character of Count Dohna were both proven by the libellant in showing the appointment of Berg as prize master, which was done to prove that in bringing the ship into our port Berg was acting in obedience to orders from Count Dohna, his superior officer. (Evidence for libellant, Record, 62.) Moreover, the official character of these men was expressly admitted in order to prevent a postponement of the trial. And at the trial, the libellant offered as its very first item of evidence the letter of Secretary Lansing to Ambassador Bernstorff, in which the facts of the case are summarized and the official character of Berg in all his dealings with the *Appam* fully recognized. The judge of the District Court very properly took these facts for granted. Nor do we know that they will be questioned by counsel for libellant here, and we take note of the matter only because of formal objections made in the District Court to testimony offered by us in that connection.

## II.

### THE CAPTURE.

That the *Appam* was captured by the *Moewe* admits of no doubt. A shot across her bow brought her to. An officer from the *Moewe* came aboard and asserted and took possession. The captain of the *Appam* submitted, and he is insistent that he did so without making resistance or even the show of it. For two days the ships were kept together, the *Moewe* in control. Then Lieutenant Berg with his prize

crew was put on board and in charge of the *Appam* by the commander of the *Moewe* and with orders from him to take her into an American port, and under these orders Berg brought the ship into Hampton Roads. But the two ships did not pass from view until the 23d and until that day they were in wireless communication with each other (Record, 27). It is true the prize crew was a small one, insufficient of itself to operate the ship, but it was sufficient to secure obedience and operation of the ship by the British crew. The prize crew kept guard and navigated the ship. What constitutes a capture is considered at length by Story, Justice, in the case of the *Alexander*, 1 Federal Cases, 357, s. c. 1 Gal, 532. He says that "in point of law, nothing more is necessary, than an intention of capture, followed up by an actual or constructive possession of the property." It is not necessary that there shall be a prize crew sufficient to operate the ship, or even that there shall be a force sufficient to maintain possession. "The acquiescence of the master and crew in the terms of the captors is a full equivalent." On appeal to this court the case was affirmed, 8 Cranch, 169, and it was held that there was an actual capture, although only a prize master was put on board. That a rescue might be attempted and effected is nothing to the purpose. It was held, indeed by Marshall, Ch. J., in the case of brig *Short Staple*, 9 Cranch, 55, that to attempt a rescue was no part of the duty of the ship's crew.

### III.

#### NO ABANDONMENT OF THE PRIZE BY THE CAPTORS.

The District Court held that the *Appam*, "as between her captors and owners, to all practical intents and purposes, must be treated as abandoned and stranded upon our shores." At the same time the court held that "the manner of bringing the *Appam* into the waters of the United States, as

well as her presence in those waters, constitutes a violation of the neutrality of the United States."

These holdings seem to be inconsistent, the one with the other. If the ship was abandoned and stranded upon our shores, that could not be a violation of neutrality. The undisputed facts are that she was not abandoned and that she was not stranded here. Captured by the *Moewe*, she was put in charge of Hans Berg, and he was ordered to bring her into an American port. Under these orders he brought her into Hampton Roads and there dropped anchor. And he did not then leave the ship, but continued in possession and was exercising dominion over her as master when this suit was instituted. And always he was acting as an officer of the German Empire, holding the ship as being the property of his government in his possession as the representative of that government.

And the capture of the ship being complete, with firm possession established, the ship became the property of the German Government. An abandonment thereafter would not restore the title of the original British owner. There was no recapture and there could be none in our waters. And so the original British owner could no more get title through stranding or abandonment in our port to this ship than to any other property of the German Government that might be abandoned or stranded here.

The case of *McDonough vs. Dannery* and the ship *Mary Ford*, 3 Dall, 188, is very much to the present purpose. The *Mary Ford* was a British merchant ship, taken on the high seas, by French men of war. The crew were removed to the captor ships. She sailed for about twenty-four hours in company of her captors, manned by a French crew, and then the French commander, not desiring to weaken his forces, gave orders to burn her. Attempts to do this were ineffectual and she was left adrift on the sea. In this condition she was found by an American vessel and brought into port. In the suit there was a claim for salvage on

behalf of the American ship which brought her in, and this was allowed since the vessel was a derelict, and consequently no one was in possession. The residue of the proceeds of her sale was claimed by the British consul on behalf of her original British owners and by the French consul on behalf of the French Republic claiming the ship as prize of war. The district Judge Lowell decided in favor of the British claimant; on appeal to the circuit court, Cushing, justice, decided in favor of the French Republic, and this decision was affirmed on appeal to the Supreme Court. The court said l. c. 188:

"In determining the question of property, we think that immediately on the capture, the captors acquired such a right, as no neutral nation could justly impugn or destroy; and consequently, we cannot say that the abandonment of the *Mary Ford*, under the circumstances of this case, revived and restored the interests of the original British proprietors."

#### IV.

#### THE LEGAL EFFECT OF THE CAPTURE.

We have here an actual and forcible taking of the ship on the afternoon of January 15. She was held in company of the *Moewe* until the afternoon of the 17th and remained under her control until the 23d. The prize crew took charge on the 17th, and she was sailed by and under the direction of that crew until the morning of February 1, when she was brought to anchor in Hampton Roads. Here were more than sixteen full days of time during which she was in the possession and under the asserted ownership and acknowledged control of the German Government. The only attempt to regain possession was that made by this suit, instituted sixteen days after the ship had come to anchor in our port. What is the legal effect of such a capture, of such reduction to possession, of such assertion of ownership and of such exercise of control?



The question is answered in the case of the *Mary Ford*, cited above, and there are many other authorities uniting with that case to say that the ship became the property of the captor's government.

In the case of the *Adventure*, 8 Cranch, 221, 1. c. 226, the court said:

"As between the belligerents, the capture undoubtedly produces a complete divesture of property. Nothing remains to the original proprietor but a mere *scientilla juris*, the *spes recuperandi*."

This case was peculiar in its circumstances. The libellants were the master and crew of an American brig which was taken by a French man of war, plundered and burnt. A few days later the Frenchmen took the British merchant ship *Adventure* carrying letters of marque and, after taking out part of the cargo, gave the residue with the ship to the libellants. They brought her into Norfolk and there libelled her as being their property under the donation of the French captain. The United States made claim under the non-intercourse act.

The District Court sustained the contention of the United States and forfeited the vessel accordingly. The Circuit Court, Marshall rendering the opinion, reversed the case and adjudged the vessel to the libellants. He considers only whether the case is within the non-intercourse act. The Supreme Court rejected both the claim of the libellants and that of the United States. The donation of the French captain was held to be of no effect, so far as concerned a transfer of title or property, and in this the court must have considered the donation as the act of the individual captor and not the act of the captor government. The donee it was said, being neutral, "could acquire no more than what was consistent with his neutral character to take." In his possession uncondemned the ship was in neutral possession, and against such a possession the right of the original owner could be asserted. So the case was dealt with as one of salvage and this being allowed the residue was held to belong to the British owner.

In the case of the *Adeline*, 9 Cranch 244, l. c. 285, Story, J., said:

"The definition of prize goods is, that they are goods taken on the high seas, *jure belli* out of the hands of the enemy. When so taken, the captors have an undoubted right to proceed against them as belligerent property in a court of prize; for in no other way, and in no other court can the question presented on a capture *jure belli* be properly or effectually examined. The very circumstance that it is found in the possession of the enemy affords *prima facie* evidence that it is his property. It may have previously possessed a neutral or a friendly character; but if the property has been changed by a sentence of condemnation or by such possession as nations recognize as firm and effectual, the neutral or friendly owner is forever ousted of his right."

The case of the *Astrea*, 1 Wheat, 125, was decided in a very brief opinion upon the authority of the case of the *Adventure*.

In the case of the *Josefa Segunda*, 5 Wheat, 338, the ship was Spanish. On a voyage from Africa to Cuba with a cargo of slaves she was captured by a Venezuelan privateer and brought by her captors into the waters of the United States with intent to sell the slaves in this country, and while thus within our jurisdiction was seized by customs officers and taken to New Orleans. There she was libelled on behalf of the United States. The original Spanish owners made claim to her, alleging that the capture by the Venezuelan privateer was illegal and piratical, and that they, the owners, were therefore not responsible for the acts of the captors. No claim was made by the captors themselves, they by an arrangement with the Spanish owners to be compensated for withholding claim, this arrangement being made on advice of the captor's counsel from a conviction on his part that they could not recover, as he conceived, on account of the illegality of their commission. The court, however, held the commission to be

legal, and the arrangement with the captors of no effect as against the United States, because made after forfeiture had been incurred, on account of infractions of the laws of the United States by the captors, who were at the time the lawful owners of the property. Condemning the ship to the use of the United States, the court, Livingston, J., l. c. 358, said:

*"This capture, then, having been made under a regular commission of the government of Venezuela, the captors acquired thereby a title to the vessel and cargo, which could only be divested by recapture, or by the sentence of a prize court of the country under whose commission the capture was made. The courts of neutral nations have no right to interfere, except in cases which do not embrace the present capture. The captors, therefore, at the time of the violation of our laws must be regarded as the lawful owners of the property, and as capable of working a forfeiture of it, by any infraction on their part of the municipal regulations of the United States. The property, in the present case, not only belonged at the time to the captors, in virtue of the capture which they had made, but it is evident from the testimony and admissions in this cause, that it was owned at the time of capture by an enemy, and that a condemnation in a prize court of Venezuela was inevitable."*

Here then was a case of lawful prize by capture on the high seas, the prize brought into our jurisdiction and, being there, held to be the property of the captors, as against the claim of the original owners, and this without any condemnation by any court of the captor's government. And, as belonging to the captors and because of the violation of our laws by them while within our jurisdiction, she was forfeited to the United States.

In the *Sally Magee*, 3 Wall., 451, the vessel, owned apparently at Richmond, Virginia, sailed from Rio Janeiro May 12, 1861, with a cargo of coffee consigned to mer-

chants at Richmond. On June 12th she was taken as prize of war and sent to New York, where both vessel and cargo were condemned. It was not denied that the property was enemy property. But Fry and Co., of New York, claimed a lien against some of the coffee, alleging that the owners, Dunlap, Moncure & Co., of Richmond, owed them \$35,326, and had authorized them to sell the property and apply the proceeds as far as necessary to pay the debt. The court said:

"The same affiant made the test affidavit, as in the other case. He referred, as in that case, to an important correspondence, and failed to produce it. The same remarks apply upon the subject. It is to be inferred, also, that the letters were written after shipment of the cargo, and, indeed, after the capture. In either case the arrangement was made too late to have any effect.

"The ownership of property in such cases cannot be changed while it is *in transitu*. *The capture clothes the captors with all the rights of the owner* which subsisted at the commencement of the voyage, and anything done thereafter, designed to incumber the property or change its ownership, is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure, to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo."

There is nothing to the contrary of this in the case of the *Nassau*, 4 Wall., 635. The question we are here considering was not involved in that case. The court simply announced that it was the general practice of nations to bring a prize into some convenient port of the government

of the captor for adjudication, and that "until there is a sentence of condemnation or restitution, the capture is held by the government in trust for those who, by the decree of the court, may have the ultimate right to it." There may be rights to the prize, other than those of the captor government. The ship may be a neutral ship, or the cargo, or portions of it may be neutral cargo. And it may be that the individual captors have rights to the prize. Where there are such rights, they must be determined by the prize court, and until so determined the capture is held by the government in trust for those entitled to it. But if, confessedly, there are no rights of neutrals or of individual captors, there is no necessity for a decree to determine such rights, and if the government of the captor can be said to hold the prize in trust, it holds it in trust for itself.

In the case of the *Nassau*, the capture was of a neutral ship, taken as prize of war in an attempt to run the blockade, during our Civil War, and the libel in the case presented claims of neutral rights. This does not appear in the case as reported in 4 Wallace, 634, but does appear in the report of the case in 17 Fed. Cas., 1180, and was, of course, shown in the record of the case in this court. The ship had been delivered to the Prize Commissioners, and was in their custody when the libel was filed. The court held that she was within the jurisdiction of the Prize Court, and so dismissed the libel. But even in this case the court denied the contention that because no libel in prize had been filed "any one had the right to proceed against the vessel for a meritorious claim." And it was in this connection that the court said that the capture was held by the government in trust for those who under the decree of the court may have the ultimate right to it. This is far from holding that the capture on the high seas of an enemy vessel is forfeited or abandoned to the original enemy owner by bringing the prize into a neutral port.



In Commodore Stewart's case, 1 Court of Claims, 113, while the right of the individual captor was involved, the court decided that by the capture, and prior to adjudication in a prize court, the title vested in the captor country. The Commodore had captured two vessels from the British, the *Cyane* and the *Levant*. The first he carried to New York, where it was condemned to him as good prize. The *Levant* was sent to a Portuguese port, where it was taken by the British in violation of the Portuguese neutrality. The Commodore contended that the title had passed by capture, and that he was therefore entitled to the value of the vessel. His right and not the right of his government was involved. And what the court said was with reference to his right. The general rule was announced that the title to property lawfully taken in war may be considered as immediately divested out of the original owner and transferred to the captor. And upon this general rule Stewart's claim was based. "But," said the court, "these general expressions refer to the time when the title of the original owner is divested, rather than when the right of the individuals making the capture vests. Attention for a moment to the foundation and origin of the right of the individual to the captured property will assist us in the solution of this question. That right is acquired not in virtue of the seizure of it as enemies' property, but by grant of the sovereign whose commission the captor bears. Judge Story says: 'It is now clear that all captures in war inure to the sovereign, and become private property only by his grant.' *The Emulous*, 1 Gall., 569."

And the court concludes that "the principle applicable to this case to be extracted from the authorities cited is, that by the capture of this ship the property is vested in the United States, and whatever right to or title in it the claimants acquired must be derived from their sovereign authority."

We are not dealing in the case at bar with the claim of individual captors, who have no right until it is decreed to them under the laws and by the courts of their country, but

with the right of the captor's government, which became vested by the capture, and which is challenged here only by the original enemy owner whose title was divested by that capture.

And so in the Manila Prize Cases, 188 U. S., 254, it is always to be borne in mind that the court was dealing with the claims of individual captors under the laws of the United States. The court was not determining the case with respect to the right of the original owner and had no occasion to determine when that was divested, although it is implied in the opinion that it was divested by the capture. It is indeed said, l. c. 260, that "ordinarily, the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation," but this is said in dealing with the claims of individual captors. The decision of the court was that, "until condemnation, captors (and individual captors are meant) acquire no absolute right of property in a prize, though then the right attaches as of the time of the capture, and it is for the government to determine when the public interests require a different destination. In respect of whatever was restored under the treaty with Spain, the government must be regarded as absolved from liability" (l. c., 278).

It is not denied that where individual interests are involved, the government, subject to its own paramount right to decide what the public interests may require, holds the property, until condemnation, in trust for those who under the decree may have the ultimate right to it. But where as in this case the capture upon the facts, which are both conceded and proven, is a valid act of war, being of an enemy ship, upon the high seas, by a man of war, in a time of war, and where there has been no recapture, the title of the original owner is divested by the capture and remains divested, until condemnation, after condemnation and without condemnation.

The British author Westlake, in his work on "International Law," says:

"The capture of enemy's property at sea ousts the enemy owner. The judgment of a prize court may be necessary for securing the discipline of the capturing country's fleet, or formerly of its privateers, and for seeing that neutrals are not unjustly despoiled, but it is not necessary against the enemy, nor does the latter's title await in suspended animation the chance of being restored by capture. Therefore the enemy has no cause of complaint if his property is destroyed at sea instead of being brought in for adjudication."

(Second Edition, Volume II, page 309.)

Wheaton, the American authority, in his work on "*Maritime Captures and Prizes*," says:

"The right of property acquired by capture continues in the captors who have brought their prize into a neutral port or within the territorial jurisdiction of a neutral power. For, though the civil right of property in the prize may not be vested in the captor until a sentence of condemnation, yet the military right of property, which is evidenced by possession, is completely vested in him by the capture. By what right then shall the neutral sovereign who is the friend of the captor, take from him these things which belong to him, *jure belli*, and give them up to another, though he be equally his friend? He cannot do it by his courts of justice, for he cannot lawfully judge between the captor and his enemy, without the consent of both. But the neutral is bound to see right wherever he sees possession; he is bound to take the fact for the law" (Chapter 9, section 5, page 259).

This question has been dealt with by our State Department during the present war. On January 12, 1915, the former British ship *Farn* was brought into the port of San Juan, Porto Rico, by a German prize crew and flying the

German flag. Mr. Lansing, now Secretary of State, and then Counsellor of the State Department, in a note of March 13, 1915, to the English Ambassador said:

"In the opinion of this Government, an enemy vessel which has been captured by a belligerent cruiser, becomes as between the two governments the property of the captor without the intervention of a prize court. If no prize court is available, this Government does not understand that it is the duty of the captor to release his prize or to refuse to impress her into its service. On the contrary, the captor would be remiss in his duty to his Government and to the efficiency of its belligerent operations if he released an enemy vessel because he could not take her in for adjudication."

Dipl. Corr. of Dept. of State, European War, No. 2, page 140.

Also Supplement to the "American Journal of International Law," July, 1915, page 363.)

Mr. Lansing, in this same note, notified the British Ambassador that the Government of the United States had decided to treat the Farn as a fleet auxiliary, and refused the request of the British Government to return this vessel to her former British owner. This was upon the doctrine that title had passed to the German Government by capture without adjudication in a prize court. If the Farn became the property of the German Government by capture, then the Appam is in the same status. If the Farn entered Porto Rico, the property of the German Government, then when the Appam entered Hampton Roads, she too belonged to that foreign sovereignty and could not be made the subject of judicial process in this country. The capture being legal, the title was not subject to question in the courts of this country.

The reason for the rule is obvious. There may in the case of a capture be an infringement of rights of neutrals. The ship may be a neutral ship or the cargo a neutral cargo, and before there is a condemnation of the property this

should be ascertained and the neutral rights recognized, if any exist. As was said by Marshall, Ch. J., in *Hudson vs. Guestier*, 4 Cranch, 293, l. c. 295, "the fact whether she is an enemy vessel or not, ought, however, to be judicially inquired into and decided, and therefore *the property in a neutral, captured as an enemy*, is never changed until sentence of condemnation has been passed." But where the vessel is confessedly an enemy we have admitted from the beginning all that could be ascertained in the prize proceeding. A neutral appearing and asserting a claim to ship or cargo would be admitted to the proceeding and heard as to his claim. An enemy would not be. If the *Appam* had been taken to Hamburg, in the prize proceedings there instituted against her, the claimant would not have been admitted as a party. As soon as it appeared and proclaimed itself a British corporation the door of the court would have been closed against it. Its very statement of ownership would have been subversive of its title, its narration of the capture a confession of the validity of the capture, a British merchant ship, with a British cargo, taken on the high seas by a German man-of-war in a time of war. This would be conclusive. A claim based on such facts would be self-condemned. And so there was not and could not be any violation of the rights of the claimant in not bringing the *Appam* into a German port.

## V.

JURISDICTION OF PRIZE CASES IS VESTED EXCLUSIVELY IN THE COURTS OF THE CAPTOR'S GOVERNMENT.

In every case of capture there may be involved the rights of neutrals, and formerly and still so, in some countries, of individual captors. The determination of these rights is exclusively for the courts of the captor government, for if the capture be not disavowed, it is an act of sovereignty, which



the sovereign cannot submit to the inquisition and determination of another government at the suit of private individuals.

This principle has long been firmly established in this country. On March 15, 1796, James Monroe, then our Minister to France, in the course of a note to the Minister of Foreign Affairs of the French Republic, complaining about the taking of prizes in our neutral waters, said:

"You will observe that I admit the principle, if a prize was taken upon the high sea, and by a privateer fitted out within the Republic or its dominions, that, in such case, our courts have no right to take cognizance of its validity."

1 Amer. St. Papers, 660.

In the case of the *Alerta*, 9 Cranch, 359, Washington, J., said, 1. c. 364:

"The general rule is undeniable, that the trial of capture made on the high seas, *jure belli* by a duly commissioned vessel of war, whether from an enemy or neutral, belongs exclusively to the courts of that nation to which the captor belongs."

To this rule he says there are exceptions which are as firmly established as the rule itself. But it will appear upon examination that these exceptions in nowise impair the principle upon which the rule is based, and also that the present case is not within the exceptions.

In the case of the *Invincible*, 1 Wheat, 238, the court considers at length the rule, which it recognizes to be that—

"Exclusive cognizance of prize questions is yielded to the courts of the capturing power."

The rule is said to be a "consequence of the equality and absolute independence of sovereign States, on the one hand, and the duty to observe uniform, impartial neutrality on the other," 1. c. 254.

Chief Justice Marshall recognized and applied the rule in the case of *Divina Pastora*, 4 Wheat, 52, and in the case of the *Estrella*, 4 Wheat, 298, Livingston, J., said, l. c. 307:

"We have been told, as heretofore, that to the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize. This is not denied; nor has the court ever felt any disposition to intrench on this rule; but, on the contrary, whenever an occasion has occurred, as in the case of *The Invincible*, 1 Wheat, 238, it has been governed by it. Not only is it a rule well established by the customary and conventional law of nations, but it is founded in good sense, and is the only one which is salutary and safe in practice. It secures to a belligerent the independence to which every sovereign State is entitled, and which would be somewhat abridged, were he to condescend so far as to permit those who bear his commission to appear before the tribunals of any other country, and submit to their interpretation or control, the orders and instructions under which they have acted. It insures, also, not only to the belligerent himself, but to the world at large, a great degree of caution and responsibility, on the part of the agents whom he appoints; who not only give security to him for their good behavior, but will sometimes be checked in a lawless career, by the consideration that their conduct is to be investigated by the courts of their own nation, and under the very eye of the sovereign under whose sanction they are committing hostilities. In this way, also, is a foundation laid for a claim by other nations, of an indemnity against the belligerent, for the injuries which their subjects may sustain, by the operation of any unjust or improper rules, which he may think proper to prescribe for those who act under his authority."

In *Jecker vs. Montgomery*, 13 How., 498, Taney, Ch. J., said, l. c. 515:

"All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question."

## VI.

IT IS NOT ESSENTIAL TO THE JURISDICTION OF THE COURTS OF THE CAPTOR COUNTRY THAT THE PRIZE BE BROUGHT INTO ONE OF ITS PORTS.

No matter where the prize may be, the court of the captor country has jurisdiction, and this is so even where the alleged prize is claimed as neutral property and is lying in a neutral port.

In *Hudson vs. Guestier*, 4 Cranch, 293, the vessel had been trading with the rebels of St. Domingo. She was captured by a French privateer and taken not to a French but to a Spanish port. The condemnation proceedings were had in a French prize court. The vessel had been seized for a violation of municipal law, but Marshall said that the principles applicable were the same as if she had been a prize of war. The case, he said, presented a single question, "Did the court of the captor lose its jurisdiction over the captured vessel by its being carried into a Spanish port?" The court said:

"The sovereign whose officer has in his name captured a vessel as prize of war, remains in possession of that vessel, and has full power over her, so long as she is in a situation in which that possession cannot be rightfully divested. The fact whether she is an enemy vessel or not, ought, however, to be judicially inquired into and decided, and therefore the property in a neutral, captured as an enemy, is never changed until sentence of condemnation has passed; all the practice of nations requires that the vessel shall be in a place of safety before such sentence can be rendered. In the port of a neutral she is in a

place of safety, and the possession of the captor cannot be lawfully divested, because the neutral sovereign, by himself or by his courts, can take no cognizance of the question of prize or no prize.

"This position is not intended to apply to the case of a sovereign bound by particular treaties to one of the belligerents; it is intended to apply only to those neutrals who are free to act according to the general law of nations. *In such case the neutral sovereign cannot wrest from the possession of the captor a prize of war brought into his ports.*

*"A vessel captured as a prize of war is, then, while lying in the port of a neutral, still in the possession of the sovereign of the captor, and that possession cannot be rightfully divested."* 1. c., 295.

Here, then, is the explicit declaration that although the vessel is neutral property and is lying in a neutral port, if she has been taken as prize of war, the neutral sovereign cannot by himself or by his courts wrest the possession from the captor. The court said further:

"The seizure, it has already been observed, vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his courts. The vessel, when carried into a foreign port, is still in his possession, and he is as capable of restoring it if the offense should not have been committed, as he is of restoring a neutral vessel unjustly captured as an enemy. The sentence in the one case may be executed with as much facility as in the other." 1. c. 297.

In *Jecker vs. Montgomery*, 13 How., 498, objection was made to the authority of the court, because the property had not been brought within the jurisdiction. But Taney, Ch. J., said, 1. c., 515:

"But that proposition cannot be maintained; and a prize court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property or award restitution, although it

is not actually in the control of the court. It may always proceed in rem whenever the prize or proceeds of the prize, can be traced to the hands of any person whatever.

"As a general rule, it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned.

"But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel; or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country; and may afterwards proceed to adjudication in a court of the United States."

## VII.

THE COURTS OF A NEUTRAL COUNTRY AS TO THE VESSEL WITHIN THEIR PORTS HELD UNDER CLAIM OF PRIZE MAY INQUIRE WHETHER HER CAPTURE WAS AN ACT OF WAR, AND WHETHER IT WAS IN VIOLATION OF THE NEUTRALITY OF THEIR COUNTRY.

It is beyond question that where a vessel claimed as a prize is lying in a neutral port, the courts of that country have a jurisdiction concerning it. We must not confound the existence of jurisdiction with the rightful exercise of it. The capture may have been an act of sheer piracy, and certainly the mere assertion of the pirate that he was acting under the commission of a sovereign power, would not shield him against inquiry by the courts.

And as was stated by Washington, J., in the case of the *Alerta*, 9 Cranch, 359, to the general rule according exclusive jurisdiction to the courts of the captor country "there are



exceptions, which are as firmly established as the rule itself." And he states the exceptions, l. c., 364:

"If the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property, so *illegally captured, to the owner.*"

To give authority to the court of the neutral country to order restitution the vessel must be brought within the jurisdiction, and it must appear that the capture itself was in violation of the neutrality of the country.

Counsel for libellant lay great stress on the case of *Glass vs. The Betsey*, 3 Dall., 6, as sustaining their contention to the contrary. It was decided in that case "that every District Court of the United States possesses all the powers of a court of admiralty, whether considered as an instance, or as a prize court," but it was also decided that its jurisdiction must be exercised "consistently with the laws of nations and the treaties and laws of the United States."

So far as it was assumed to have impaired the general rule as to the jurisdiction of the courts of the captor country, Story, J., said, in the case of the *Invincible*, 13 Fed. Cas., 72, that the doctrine asserted in the *Betsey* case is "encountered \* \* \* and in no small degree shaken, by the opinion of the Supreme Court in *Hudson vs. Guestier*, 4 Cranch, 293." And on the appeal of the case of the *Invincible*, 1 Wheat, 238, the scope of the decision in the *Betsey* case was clearly defined. The court was inquiring whether the principle of the exclusive cognizance by the courts of the captor country would support a plea to the jurisdiction of our admiralty courts, and if not, "then does not jurisdiction over the subject-matter draw after it every incidental or resulting question relative to the disposal of the proceeds of the *res subjecta*?" The court said, l. c., 257:

"The first of these questions was the only one settled in the case of *Glass vs. The Betsey*, 3 D., 6, and the case was sent back with a view that the district court should exercise jurisdiction, subject, however, to the law of nations on this subject as the rule to govern its decision.

"And this is certainly the correct course. Every violent dispossession of property on the ocean, is, *prima facie* a maritime tort; as such it belongs to the admiralty jurisdiction. But sitting and judging, as such courts do, by the law of nations, *the moment it is ascertained to be a seizure by a commissioned cruiser, made in the legitimate exercise of the rights of war, their progress is arrested; for this circumstance is, in those courts, a sufficient evidence of right.*

"That the mere fact of seizure as prize does not, of itself, oust the neutral admiralty court of its jurisdiction, is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possessions; to wit: those in which her own right to stand neutral is invaded; and there is no case in which the court of a neutral may not claim the right of determining whether the capturing vessel be, in fact, the commissioned cruiser of a belligerent power."

The *Invincible* was a French privateer. She was captured by a British ship during the war of 1812, recaptured by an American privateer, captured again by a British ship, and again recaptured by an American privateer. She was brought into Portland and libelled for adjudication as prize of war. The French consul interposed a claim for the French owners for restitution subject to salvage. Some American citizens interposed a claim for a ship and cargo taken on the high seas by the *Invincible* before her first capture by the British. The claim of the Americans was denied upon the ground that the courts of this country have no jurisdiction to redress supposed torts committed on the high seas upon the property of its citizens by a commissioned cruiser of a foreign and friendly power, and restitution was awarded to the original French owner.

There is here no question of piracy. The capture of the *Appam* was an act of war by the German Government during a time of war. It was the seizure of an enemy vessel by officers duly commissioned, whose act is fully approved by their government. It is recognized as an act of war by our government in its diplomatic correspondence, and was found to be such by the district court. However much we contest the correctness of the conclusion reached by that court, it found the essential facts as they were. It found correctly that the *Appam* had been taken as prize of war, but erred in holding as matter of law that she was abandoned by bringing her into our port, and that thereby there was a breach of our neutrality, which entitled the original owner to restitution. Our contention is that under all the decisions of this court, when the *Appam* was found to be a prize of war, the libel should have been dismissed, unless it was further found that *in the circumstances of the capture itself* there was a violation of our neutrality.

## VIII.

BRINGING THE APPAM INTO OUR WATERS DID NOT  
AUTHORIZE RESTITUTION TO THE ORIGINAL BRITISH OWNERS.

Postponing the question, whether bringing the *Appam* into Hampton Roads was a violation of our neutrality, we submit that it was no violation of any right of the libellant, nor of any duty or obligation due to it from the United States.

The breach of neutrality which will forfeit a prize of war must be one which invalidates the capture itself, which involves the neutral nation as a participant in the act of war committed in taking the prize. It must be an act in derogation of the sovereignty of the neutral country and in denial of the protection which the captured ship was entitled to receive from the neutral power.

If the capture is made in the neutral waters and the prize is brought within the jurisdiction of the sovereign whose

neutrality has been violated, restitution will be decreed, because the capture was an act of trespass upon the sovereignty of the neutral power, not sanctioned by the laws of war, and moreover, a violation of the shelter and asylum which the captured vessel had a right to expect in the neutral waters. Not to resent the trespass in such a case, and to require reparation for the wrong, where reparation can be made, is to participate in the wrongful act.

And of like nature is the case where the captor ship has been equipped, or its equipment has been augmented, within the neutral territory. Fitting out a ship of war in whole or in part in neutral territory is in derogation of the sovereignty of the neutral country, and is also in violation of the security to which the captured vessel was entitled against menace from a neutral source. And so here, also, not to require redress of the wrong where that can be done is to participate in the wrong.

It is in these cases, and only in these cases, that restitution of prizes of war has been ordered by this court, as a review of the decisions will show. If the mere bringing of a prize into our waters required restitution, then in every such case restitution would be ordered, and inquiry into the circumstances of the capture would be unnecessary.

Bringing the vessel into our port gives jurisdiction to our courts of admiralty to inquire into the circumstances of the capture, and to award restitution if the capture itself was illegal, but bringing the vessel in is not the foundation of the right to redress. It simply gives opportunity to award and enforce redress.

The exceptions to the rule as to the exclusive cognizance of prize cases by the courts of the captor country have never been extended to cases of alleged violation of neutrality after the capture, and not inherent in the capture. The policy of our Government was fixed and made public during the administration of Washington, and has been adhered to ever since, and the decisions of this court are in perfect harmony with that policy.

On November 14, 1793, Jefferson, then Secretary of State, in a letter to the British Minister, said (4 Jefferson's Works, 78 (ed. H. A. Washington):

"Restitution of prizes has been made by the Executive of the United States *only in two cases*: 1st, of capture within their jurisdiction, by armed vessels, originally constituted such without the limits of the United States; or 2nd, the capture, either within or without their jurisdiction, by armed vessels, originally constituted such within the limits of the United States, which last have been called proscribed vessels."

And Washington, in his address to Congress, December 3, 1793 (1 Am. State Papers, 21), said:

"In this posture of affairs, both new and delicate, I resolved to adopt general rules, which should conform to the treaties, and assert the privileges, of the United States. These were reduced into a system, which will be communicated to you. Although I have not thought myself at liberty to forbid the sale of prizes, permitted by our treaty of commerce with France to be brought into our ports, I have not refused to cause them to be restored *when they were taken within the protection of our territory, or by vessels commissioned or equipped in a war-like form within the limits of the United States.*"

Restitution of a prize has never been decreed by this court unless the capture was in violation of the principle announced by Washington and Jefferson.

In *Talbot vs. Jansen*, 3 Dall., 133, the vessel claimed as prize was taken on the high seas and sent by the captor under a prize crew into Charleston harbor. Restitution was ordered because the captor vessel had been fitted out in our ports and the capture was of a ship of a nation with which we were at peace. Paterson, J., said, l. c. 157:

"The principle deducible from the law of nations, is plain; you shall not make use of our neutral arm to capture vessels of your enemies, but of our



friends. If you do, and bring the captured vessels within our jurisdiction, restitution will be awarded."

In the case of the brig *Alerta*, 9 Cranch, 359, the vessel, a Spanish one, was captured by a French privateer and a prize-master put on board with directions to steer towards the Balize. The force of the privateer had been increased in the United States. Washington, J., said, l. c. 364:

"The general rule is undeniable, that the trial of captures made on the high seas, *jure belli*, by a duly commissioned vessel of war, whether from an enemy or a neutral, belongs exclusively to the courts of that nation to which the captor belongs. To this rule there are exceptions, which are as firmly established as the rule itself. If the capture be made within the territorial limits of a neutral country into which the prize is brought, or by a privateer which had been illegally equipped in such neutral country, the prize courts of such neutral country not only possess the power, but it is their duty to restore the property, so illegally captured, to the owner. This is necessary to the vindication of their own neutrality."

In the case of the *Invincible*, 1 Wheat., 238, the prize was brought into our ports, and our court had jurisdiction to determine the case, but it was held that it could give no redress except where there was a violation of our neutrality inherent in the capture.

In the case of the *Divina Pastora*, 4 Wheat., 52, a Spanish vessel had been captured on the high seas by a privateer of the United Provinces of Rio de la Plata and brought into the port of New Bedford, under charge of a prize crew, without convoy. It was said that she came into this port under stress of weather, but how this could happen in the course of a voyage from Port au Prince to Buenos Ayres does not appear. Mr. Webster and Mr. Ogden, who appeared for the original owner, made no claim on the ground that the ship had been brought into our ports, but insisted only upon the fact that the captor ship

- was not legally commissioned. Marshall, Ch. J., said, l. c. 64, that "If, therefore it appeared in this case, that the capture was made under a regular commission from the government established at Buenos Ayres, by a vessel which had not committed any violation of our neutrality, the captured property must be restored to the possession of the captors."

In the case of the *Estrella*, 4 Wheat., 298, the captor ship, a privateer commissioned by the Republic of Venezuela, was manned within the United States by citizens and residents of the United States, and for that reason restitution was awarded. In the course of its opinion the court said, l. c., 308-9:

"A neutral nation, which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture, made under their respective commissions, and to decide on every question of prize law which may arise in the progress of such discussion. But it is no departure from this obligation if, in a case in which a captured vessel be brought or voluntarily comes, *infra presidia*, the neutral nation extends its examination so far as to ascertain whether a *trespass has been committed on its own neutrality by the vessel which has made the capture*. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right, and its safety, good faith and honor demand of it, to be vigilant in preventing its neutrality from being abused, for the purposes of hostility against either of them. This may be done, not only by guarding, in the first instance, as far as it can, against all war-like preparations and equipments in its own waters, but, also, by restoring to the original owner such property as has been wrested from him, by vessels which have been thus illegally fitted out. In the performance of this duty, all the belligerents must be supposed to have an equal interest, and a disregard or neglect of it would inevitably expose a neu-

tral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored.

"The United States, instead of opening their ports to all contending parties, when at peace themselves, (as may be done, if not prevented by antecedent treaties), have always thought it the wisest and safest course, *to interdict them all from fitting out or furnishing vessels of war within their limits, and to punish those who may contribute to such equipments.*"

In *Neutra, Signora de la Caridad*, 4 Wheat., 497, a Spanish vessel and her cargo were captured during a war between Spain and her South American Colonies, by a commissioned cruiser of Carthagená, one of those colonies. A prize crew was put on board. She was captured by an American privateer, and the cargo was brought into the United States. The original Spanish owner and the prize master both made claim. The court decreed that the goods be restored to the Carthagénan prize master on the ground that by the capture on the high seas, the original Spanish owner was divested of his title, and that the courts of this country would not decree restitution unless either, the captor vessel was a proscribed one, or the capture was made within our territorial limits. The opinion was unanimous. In the course of it, Johnson, J., says (l. c., 501, 502):

"There is no doubt, that the property was Spanish, nor that the privateer *La Popa* was commissioned as a cruiser, whilst the Province of Carthagená had an organized government; and there is the fullest evidence, that her armament and equipment was unaffected by any charge of having been made in violation of our laws. The only question in the case is, whether an original Spanish owner is entitled to the aid of the courts of this country, to restore to him property of which he has been dispossessed by capture, under a commission derived from the revolted colonies, and this question is considered, by

this court, as having been fully decided by the principles assumed in the case of the *United States vs. Palmer*, at the last term (3 Wheat., 610), and by the decisions in the cases of *The Estrella* (p. 298), and *The Divina Pastora* (p. 52), at the present term.

"War notoriously exists, and is recognized by our government to exist, between Spain and her colonies. This is an appeal to the highest of all tribunals on a question of right. No neutral nation can act against either, without taking part with the other in the war. All that the law of nations requires of us, is strict and impartial neutrality, and no friendly nation ought to demand of the courts of this country to do an act which may involve it in a war with the victor. Our duty is, where the property of either is brought innocently within our jurisdiction, to leave things as we find them."

In *la Amistad De Rues*, 5 Wheat., 385, Story, J., says that "the doctrine heretofore asserted in this court is, that *whenever a capture is made by any belligerent, in violation of our neutrality*, if the prize comes voluntarily within our jurisdiction, it shall be restored to the original owners."

The vessel *La Concepcion* was ordered restored in 6 Wheat., 235, because she was a Spanish vessel and was taken by a ship built, armed, equipped and owned in the United States, and brought into our ports, we at the time being in amity with Spain.

In *Santissima Trinidad*, 7 Wheat., 283, the ship was captured on the high seas and a part of her cargo taken from her and brought by the captors to Norfolk. The vessel was Spanish and the captor claimed to be a commissioned officer of a South American Republic. It was contended that the force of the captor had been augmented within the United States, and upon this ground restitution was decreed.

Story, J., l. c., 278, said:

"It does not lie in the mouths of wrongdoers to set up a title *derived from a violation of our neutrality*."

There was much controversy of law and fact in the case, and all unnecessary, if the mere bringing the property within our jurisdiction would avoid the capture. This simple solution of the question did not suggest itself to either Daniel Webster or Mr. Justice Story.

Of the same character are the cases of *Gran Para*, 7 Wheat, 471, the *Santa Maria*, 7 Wheat, 490, and the *Monte Allegre*, 7 Wheat, 520.

The principle of these cases is plain; its extent and limitations apparent. When that has been done in the way of making a capture which should not have been done and which the United States should have prevented, as a capture within its limits, or the equipment of the captor vessel within its territory then the maintenance of its neutrality, requires that restitution shall be made if it can be, and of course it can if the property so taken in contravention of our sovereignty and neutrality is brought within our jurisdiction. But bringing the prize property within the jurisdiction is not the offense for which reparation is required. The offense is the illegal capture. Where, as in this case, the capture was a valid act of war, made under the commission of a belligerent power on the high seas, and the capture is complete, the crew of the captured ship submitting to the control of the captors, and there remains nothing but the hope of recapture, a hope that is not realized, the captured ship is good prize and is the property of the captor government, as much so as are its ships of war, and what its rights or privileges in our ports may be, how long it may stay, or whether it may come into them at all, are questions between our government and the government of the captors, and do not at all concern the original owner of the captured ship.

He has not been injured, he has lost nothing by such acts. But when the violation of neutrality inheres in the capture, as when made in neutral waters, he has been injured, he has lost something, his ship being taken in waters where it should be safe. And so when his ship is taken by



one armed and equipped in a neutral country he has been injured and he has lost something because his danger came from a source from which he should be free.

The offended sovereign owes it to his own dignity and it is his duty to those who have reposed confidence in his neutrality to undo the wrong that has been done, and undoing the wrong means restoration of the conditions existing before the violation of the neutrality. Had the *Moewe* taken the *Appam* in our waters, undoing that wrong, would leave the *Appam* in the possession of the original owner. And so if the *Moewe* had been armed and equipped within our waters.

But as the case stands, if the prize crew did wrong in bringing the *Appam* into Hampton Roads, undoing that wrong would not leave the ship in the possession of the original owner. It would simply put her back outside the three mile limit, still in possession of Lieutenant Berg and his prize crew, and they free to try their fortune with the ship in some other way or some other direction.

In harmony with the cases dealing with this question directly are those involving captures in neutral waters other than those of the country in which the prize proceedings are had.

In the case of the *Anne*, 3 Wheat., 435, a British ship was captured by a United States privateer within the territorial limits of Spanish St. Domingo, and brought to New York. It was held that only the Spanish government could, and that the former British owner could not, complain of this breach of neutrality. Story, J., 1. c., 447, said:

"A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him, and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli*; to the

captors. This is the clear result of the authorities; and the doctrine rests on well-established principles of public law."

In the case of *Sir William Peel*, 5 Wallace, 517, the ship, a British merchantman, was, during our Civil war, captured by the United States ship *Seminole* in Mexican waters and brought to New Orleans, where the vessel and cargo were duly libeled as prize. The British owners of the ship and cargo made claim for restitution. It was held that the capture in neutral waters might constitute a ground of claim by the neutral power whose territory had suffered trespass, but that neither an enemy nor a neutral acting the part of an enemy could demand restitution of captured property on the sole ground of capture in neutral waters.

To the same effect is the case of the *Adela*, 6 Wall., 266.

In *The Florida*, 101 U. S., 37, a United States ship of war captured the Confederate steamer *The Florida*, in a Brazilian port. Brazil was a neutral in our civil war. The commander of the United States ship libelled the *Florida* as prize of war. The Government of the United States disavowed the action of the commander and made apology and reparation to Brazil for the violation of its neutrality. The libel of the commander was dismissed. The court said:

"The legal principles applicable to the facts disclosed in the record are well settled in the law of nations, and in English and American jurisprudence. Extended remarks upon the subject are, therefore, unnecessary. See Grotius *De Jure Belli*, B. 3, ch. 4, sec. 8; *Bynkershoek* 61, ch. 8; *Burlamaqui*, vol. II, pt. 4, ch. 5, sec. 19; *Vattel*, B. 3, ch. 7, sec. 132; *Dana's Wheat*, sec. 429 and *n.*, 208; 3 *Rob. Adm. Rep.*, 373; 5 *Rob. Adm.*, 21; *The Anne*, 3 *Wheat.*, 435; *La 'Amistad De Rues*, 5 *Wheat.*, 385; *The Santissima Trinidad*, 7 *Wheat.*, 283, 496; *The Sir Wm. Peel*, 5 *Wallace*, 517; *The Adela*, 6 *Wall.*, 266; 1 *Kent Com.*, last ed., pp. 112, 117, 121.

"Grotius, speaking of enemies in war, says: 'But that we may not kill or hurt them in a neutral country, proceeds not from any privileges attached to their persons, but from the right of the prince in whose dominions they are.'

"A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

"The latter was not done in this case because the captured vessel had been sunk and lost. It was, therefore, impossible.

"The libellant was not entitled to a decree in his favor, for several reasons.

"The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here the capture was promptly disavowed by the United States. They, therefore, never had any title."

The case of the *Queen vs. The Chesapeake*, 1 Oldright (Nova Scotia), 797, cited by the libellant, does not support its claim of restitution. The decision was by a single judge. The facts were quite exceptional. During our Civil War some persons shipped as passengers on the steamer *Chesapeake*, plying between New York and Portland. On the high seas they overpowered the crew, after killing one of them, and brought the ship into Nova Scotian waters, where they landed her and sold part of her cargo. They claimed to be in the service of the Confederate States and duly authorized to capture the *Chesapeake*. They were pursued in the British waters by a United States gunboat, whereupon they abandoned the ship and fled to the shore. The commander of the gunboat seized the ship and carried her to Halifax, where she was delivered to the British authorities. Vessel and cargo were then brought before the court of admiralty for adjudication. The Confederate captors did

not appear, but forcibly resisted service of process against them, and the court said "they are all now fugitives from justice." The judgment therefore was upon default. The case seems to have created great excitement, both because of the conduct of the Confederates and because of what was said by the court to be "the gross outrage on the liberty of our fellow subjects, and the contemptuous and coarse violation of Her Majesty's proclamation and her territorial rights, perpetrated by officers of the navy of the United States." The opinions delivered in the case at its various stages are addressed in considerable part to this excited public opinion. The question to be determined was as to the right of the original owners, and restitution was awarded. His lordship, Stewart, J., did not recognize the captors as commissioned by the Confederate Government, but treated the case as one of piracy throughout, and that excluded at once any such questions as those in the case at bar. He did say in the course of one opinion that "for a belligerent to bring an uncondemned prize into a neutral port, to avoid recapture, is an offense so grave against the neutral State, that it *ipso facto* subjects that prize to forfeiture," l. c., 810. But he does not intend by this that it entitled the original owner to restitution, for he says, l. c., 804: "The conduct pursued by the persons who seized the *Chesapeake*, after the seizure—though it were a lawful seizure—has, as I think, by international law, *rendered their prize subject to forfeiture to Her Majesty*, to be dealt with as to her may seem fit."

The case of *Williams vs. Armroyd*, 7 Cranch, 423, distinctly emphasizes the rule that restitution will be made only when the prize was taken in our waters, or by a ship unlawfully equipped within our borders. In that case an American schooner, the *Fortitude*, had been taken by a French privateer, under authority of the Milan decree of September 17, 1807. The captors took her into the Dutch port of St. Martin's, and there the vessel and cargo were sold. Later proceedings were instituted in a French court, and the ship

and cargo condemned as good prize. A portion of the cargo sold at St. Martin's was by the purchaser sent to Philadelphia, where it was libelled by the original owner. It was contended by him that the sale at St. Martin's was void, because made before condemnation had been pronounced, and also that the sentence was void, because made under a decree which our Government had declared to be subversive of neutral rights and national law. As to the first proposition, Marshall, Ch. J., said that the capture was made by and for the French Government, and the condemnation related back to the capture, and affirmed its legality. As to the second proposition, while denouncing the Milan decree as "a direct and flagrant violation of national law," declared so to be by Congress, still, he said, that could not avail the libellant, because Congress had not chosen to declare the nullity of sentences pronounced under the decree. The act of capture was unlawful, but it was an act of the French Government, and how it should be dealt with was for our Government to determine. In itself, under principles of international law, the wrongful act gave no right of action to individuals who had been injured by it.

The present case is a very different one. The capture was a fair one under the laws of war, and the ship being the property of an enemy subject—enemy to Germany—became at once the property of the German Empire. Whether what was done with the ship thereafter by the officers of the Empire who had her in charge was in violation of our neutrality, is a matter which in nowise concerns the original British owner, and can give him no right of action. As soon as the facts of the case were ascertained the court should have dismissed the libel.



## IX.

THE APPAM IS A PUBLIC SHIP OF THE GERMAN EMPIRE, AND ENTITLED TO ALL THE RIGHTS AND IMMUNITIES OF SUCH A SHIP.

When the *Appam* was captured she became by that act the property of the German Empire. There were no claims of neutrals to be considered or determined, for the original owner was admittedly a British subject, whose vessel on the high seas was subject to capture, and who by such capture lost his property.

In the capture itself there had been no offense to any neutral government, for the capture was not made within neutral waters, but on the high seas; nor by a vessel armed or equipped in neutral territory, but by a regularly commissioned cruiser of the German navy.

The persons who made the capture, as individuals, had no property in the ship whatever. They were acting as duly authorized representatives of the German Empire, and their act was the act of the Empire. In the view of the law the capture was by the Empire, and the ship became the property of the German government.

As the property of the German government the ship was public property—a public ship—and could be nothing else. That government might devote her to any use it deemed proper or might destroy her altogether. But whether converted into a ship of war, or used as a transport or tender or hospital ship, or for the carriage of mail or the transportation of freight and passengers, she remained a public ship, the property of a sovereign power with whom we were at peace.

She was a public ship after capture by the *Moewe* and remained such when she sailed away alone for an American port flying the German flag. She was under command of Hans Berg, as a lieutenant of the German navy, and was under the control of and was navigated by a prize crew of

members of the German navy. A ship may be a public ship without being a ship of war. There are uses other than those of war to which public property may be devoted.

Hall on International Law, 5th ed., p. 161, says:

"Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law."

The Government of the United States, in this war has announced its intention to treat a prize as a public vessel. The President, on November 13, 1914, issued a neutrality proclamation in reference to the Panama Canal Zone. Under our existing treaty obligations the enforcement of neutrality in the Panama Canal Zone devolves upon the United States. This proclamation consists of a series of rules. Rule 1 defines an armed vessel of war. Rule 2 covers other vessels employed by a belligerent "for the direct purpose of prosecuting or aiding hostilities." Rule 4 reads, in conclusion, as follows:

"Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents."

Dipl. Corr. of Dept. of State, European War, No. 2, pp. 18, 19.

Here is a declaration by the Chief Executive of this country, classifying prizes of war as other public vessels, and completely silent as to any difference in treatment, whether convoyed or not.

Counsel for libellants present the same view and contend that not only was the *Appam*, when brought into Hampton Roads, a public ship of the German government, but that she was a ship of war, and came into our port on a mission of war.

They said in their brief in the district court that "the prize crew cannot be augmented without violating the provisions of the American neutrality laws, as this would constitute the augmentation of a naval expedition, the object of which would be the transportation of an uncondemned prize to the captor's country for condemnation" (pp. 80 and 81 of their brief). The district court accepted this view, and held that the ship "is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality" (Rec., 93).

What is this but holding the *Appam* to be a public ship and a ship of war, and charging her with a disability incident to that character, i. e., the disability to augment her crew? A mere merchant ship may augment her crew, and so may a public ship, if it be a ship of peace as a hospital ship. If the *Appam* is subject to the disabilities of a ship of war, it is also entitled to the immunities incident to that character.

What were the rights of the *Appam* as she came to our coast? In the case of the *Exchange*, 7 Cranch, 116, 1. c. 141, Marshall, Ch. J., answered:

"If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place."

While the Chief Justice here speaks of vessels of war, he by no means intends to limit the rule announced to such ships. As was said by Judge Gray in *Briggs vs. Light Boats*, 11 Allen (Mass.), 157, 1. c. 186, "the exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character."

And this was the view of the English court in the case of the *Parlement Belge*, Law Reports, 5 Probate Division, 197. This was a suit to recover redress in respect to a collision, by the owners of the *Daring* against the *Parlement Belge*. The Attorney General of England entered a protest against the jurisdiction of the court on the ground that the libelled ship was the property of the King of Belgium in his sovereign capacity. Affidavits were filed, and not contradicted, that the ship, in addition to mail, carried merchandise and passengers for hire. It was contended on the one side that only armed ships of war or ships which though unarmed are in the employ of the government as part of the military force of the State are exempt from judicial process, and on the other that all movable property, which is the public property of a sovereign and nation used for public purposes is so exempt. The court cites with marked approval the case of *The Exchange*, 7 Cranch, 116. It is said in the course of the opinion:

"But it is said that this vessel, though it is the property of a friendly sovereign in his public capacity and is used for purposes treated by him as public national services, can be seized and sold under the process of the Admiralty Court of this country, because it will, if so seized and sold, be so treated, not in a suit brought against the sovereign personally, but in a suit *in rem* against the vessel itself. This contention raises two questions: first, supposing that an action *in rem* is an action against the property only, meaning thereby that it is not a legal proceeding at all against the owner of the property, yet can the property in question be subject to the jurisdiction of the court? Secondly, is it true to say that an action *in rem* is only and solely a legal procedure against the property, or is it not rather a procedure indirectly, if not directly, impleading the owner of the property to answer to the judgment of the court to the extent of his interest in the property?

"The first question really raises this, whether every part of the public property of every sovereign au-

thority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign. Whether it is so or not depends upon whether all nations have agreed that it shall be, or in other words, whether it is so by the law of nations. The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations. An equal exemption from interference by any process of any Court of some property of every sovereign is admitted to be a part of the law of nations. The universal agreement which has made these propositions part of the law of nations has been an implied agreement. Whether the law of nations exempts all the public property of a state which is destined to the use of the state, depends upon whether the principle, on which the agreement has been implied, is as applicable to all that other public property of a sovereign or state as to the public property which is admitted to be exempt. If the principle is equally applicable to all public property used as such, then the agreement to exempt ought to be implied with regard to all such public property. If the principle only applies to the property which is admitted to be exempt, then we have no right to extend the exemption.

\* \* \* 205 and 206.

"It puts all the public movable property of a state, which is in its possession for public purposes, in the same category of immunity from jurisdiction as the person of a sovereign, or of an ambassador, or of ships of war, and exempts it from the jurisdiction of all Courts for the same reason—viz., that the exercise of such jurisdiction is inconsistent with the independence of the sovereign authority of the state'.

\* \* \* 213.

"The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador



of any other state, or over the public property of any state which is destined to public use or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction.' " 214-215.

The *Appam*, as a consequence of capture, became a public ship, because she became the property of the German Empire. There existed then no adverse claim on behalf of anybody that could be effectively asserted against her. The original owner was British, the subject of a nation at war with Germany. The individual captors had and claimed no right whatever. No neutral interests of any kind then existed. And as she sailed for sixteen days under orders of the German captain acting as such and in charge of a German lieutenant, also acting in his official capacity, she was a German public ship when she came to our three-mile limit. Crossing the line did not change her character, whether she crossed by right or by wrong. She was the same upon one side of the line as upon the other, a public ship of the German Empire, entitled to all the immunities of such a ship.

The general practice of our Government has been in harmony with the views we present. American sailors have on more than one occasion shown themselves to be good lawyers. John Paul Jones, writing to Robert Morris, October 13, 1783, with respect to prizes sent into a Norwegian port, said:

"Allow me also to entreat the most serious attention of Congress to the insult that was offered to the flag of America by the court of Denmark, in giving up to England towards the end of the year 1779, two *lettre-of-marque* ships (the one the *Union*, from London, the other the *Betsy*, from Liverpool) that had entered the port of Bergen, in Norway, as *my prizes*, for though the Government of Denmark *might have had* a right to refuse them an asylum, yet it could have no right to force them out of our hands and restore them to the enemies." (7 Diplomatic Correspondence of the U. S., p. 288.)

These prizes were sent from the point of capture by means of prize crews, not under convoy of the captor vessel and they did not put into Bergen on account of stress of weather, but were sent there from the point of capture.

The position of Jones was fully supported by our Government, at that time and afterwards. Respecting these same prizes, Benjamin Franklin wrote, as soon as he had learned of their surrender, to the Danish Minister of Foreign Affairs:

"Permit me, sir, to observe on this occasion that the United States of America have no war but with the English; that they have never done any injury to other nations, particularly none to the Danish nation; on the contrary, they are in some degree its benefactors, as they have opened a trade of which the English made a monopoly, and of which the Danes may now have their share, and by dividing the British Empire have made it less dangerous to its neighbors. They conceived that every nation whom they had not offended was by the rights of humanity their friend; they confided in the hospitality of Denmark, and thought themselves and their property safe when under the roof of his Danish Majesty. But they find themselves stripped of that property, and the same given up to their enemies on this principle only, that no acknowledgment has yet been formally made by Denmark of the independence of the United States, which is to say that there is no obligation of justice towards any nation with whom a treaty promising the same has not been previously made. This was, indeed, the doctrine of ancient barbarians, a doctrine long since exploded, and which it would not be for the honor of the present age to revive; and it is hoped that Denmark will not, by supporting and persisting in this decision, obtained of his majesty, apparently by surprise, be the first modern nation that shall attempt to revive it." (3 Whart. Dip. Corr. of the Am. Rev., 433.)

Later, on July 21, 1785, writing to Jones on the same subject, Franklin said:

"The offer of which you desire I would give you the particulars, was made to me by M. Le Baron de Waltersdorff, in behalf of his Majesty the King of Denmark, by whose ministers he said he was authorized to make it. It was to give us the sum of ten thousand pounds sterling, as a compensation for having delivered up the prizes to the English. I did not accept it, conceiving it much too small a sum, they having been valued to me at fifty thousand pounds." (7 Diplomatic Correspondence of the U. S., p. 341.)

The Congress of the Confederation passed the following resolution:

"*Resolved*, That the minister of the United States at the Court of Versailles be, and he hereby is authorized and instructed, to represent to his Danish Majesty that the United States continue to be very sensibly affected by the circumstance of his Majesty having caused a number of their prizes to be delivered to Great Britain during the late war; and the more so, as no part of their conduct had forfeited their claim to those rights of hospitality which civilized nations extend to each other. That not only a sense of the justice due to the individuals interested in those prizes, but also an earnest desire that no subject of discontent may check the cultivation and progress of that friendship which they wish may subsist and increase between the two countries, prompt the United States to remind his Majesty of the transaction in question." Resolution of October 25, 1787 (7 Dipl. Corr. of the U. S., p. 362).

Jefferson, then our Minister to France, wrote to the Danish Secretary on January 21, 1788, a letter on the lines of this resolution (6 Jefferson Works, Monticello Ed., 414).

So late as November 10, 1843, Wheaton, then our Minister to Prussia, wrote:

*"If, then, there was no express prohibition in this case, and if there was no treaty existing between Denmark and Great Britain by which the former was bound to refuse to the enemies of the latter those privileges (and I suppose there was no such prohibition or treaty) then the American cruisers had an unquestionable right to send their prizes into Danish ports. Still more had they such right, grounded on necessity arising from stress of weather, as appears to have been the case here. When once arrived there, the neutral government of Denmark was bound to respect the military right of possession, lawfully acquired in war by the captors on the high seas and continued in the neutral port into which the prize was brought" (Moore's Int. Law Digest, vol. VII, p. 982).*

In a note to the British Minister of date September 9, 1793, Mr. Jefferson said:

*"As we are bound by treaty to receive the public armed vessels of France, and are not bound to exclude those of her enemies, the Executive had never denied the same right of asylum, in our ports, to the public armed vessels of your nation. They, as well as the French, are free to come into them in all cases of weather, pirates, enemies, or other urgent necessity, and to refresh, victual, repair, etc. And so many are these urgent necessities, to vessels far from their own ports, that we have thought inquiries into the nature, as well as the degree, of their necessities which drove them hither, as endless as they would be fruitless; and, therefore, have not made them. And the rather, because there is a third right, secured to neither by treaty, but due to both, on the principles of hospitality between friendly nations—that of coming into our ports, not under the pressure of urgent necessity, but whenever their comfort or convenience induced them. On this ground, also, the two nations are on a footing" (Mr. Jefferson, sec. of State, to Hammond, Brit. Min. Sept. 9, 1793, Am. State Pap.; For. Rel. 1, 176; 4 Jefferson's Works, 65, Ed. H. A. Washington; Moore Int. Law Digest, vol. VII, p. 983).*

Caleb Cushing, certainly one of the ablest of our Attorneys General, had occasion to deal with the question during the Crimean war. The *President*, a British warship, brought a Russian vessel, the *Sitka*, as a prize into the port of San Francisco. Two persons, held as prisoners on board the *Sitka*, presented a petition for a writ of *habeas corpus*, alleging that they were unlawfully detained and confined by the prize officer and crew of the *Sitka*. The writ was served and thereupon the commander of the *Sitka* immediately got under way and sailed out of the port. The Secretary of State, Mr. Marcy, desired to know whether this conduct of the prize officer of the *Sitka* constituted a just cause of complaint on the part of this Government under the law of nations or any treaty between the United States and a foreign power. Mr. Cushing considered the matter at length and said as to ships of war (7 Op. Att'y Gen'l, 122, l. c., 125):

"In the present state of the law of nations it is universally conceded, that the armed ships of a belligerent, whether man of war or private armed cruisers, are to be admitted, with their prizes, into the territorial waters of a neutral for refuge, whether from chase or from the perils of the sea. That is a question of mere temporary asylum, accorded in obedience to the dictates of humanity, and to be regulated by the specific exigency.

"Going beyond this, we find that the ships of war of a belligerent are generally admitted into the ports of the neutral, even when there is no exigency of humanity, but still under certain reservations. The neutral nation has perfect right so to measure the extent of the asylum thus accorded, as to cover its own safety and retain the means of enforcing respect for its own sovereignty."

Dealing with the question of prizes he said, l. c. 129:

"But a neutral power may be so confident in its own strength, or so remote from the immediate scene of war, as not to have conceived it necessary to issue any regulation on the subject of belligerent asylum. In



that case, the right of asylum is presumed; for it would be unjust for the neutral State to reject it without previous notification to the belligerent States (Vattel 1, III, ch. 7, sec. 132; Wheaton, p. 471). And such, at the present time, is the relation of the United States to this question.

"It must be admitted, therefore that the British ship of war, *President*, with her prize, the *Sitka*, had a perfect right to enter the port of San Francisco, and remain there a reasonable time for any of the purposes compatible with the neutrality of the United States.

"That being the case, it seems to me unimportant whether the *President*, with her prize entered the port of San Francisco from a long cruise, or directly from a Russian port, or whether she had, since the capture, touched at a British port. No treaty, no act of Congress, no received rule of the law of nations, raises any such question. The United States might, if they pleased, exclude prizes of war from their ports either absolutely, or under qualification in favor of cases of mere distress, or previous condemnation, or non-accessibility of any port of the belligerent power itself. But the United States have not in fact done this, and the faculty of doing it is a political one, and foreign to the powers and the duties of the courts, whether of the States or of the United States.

"Any officer, bearing the proper commission of his government, had as much right to enter the port of San Francisco in command of the *Sitka*, as if in command of the *President*, without its being the right or the duty of the United States to demand explanations as to her last or any previous port of departure."

Exceptions to the doctrine are recognized by him on page 181:

"Such, for instance, is the case of *uncondemned prizes, which may have been captured in violation of the neutral immunity in the regard of place*, or by a cruiser equipped in violation of the rights of the neutral sovereign, and are then brought within his jurisdiction, either voluntarily or by stress of weather."

Raphael Semmes, of the *Alabama*, was an excellent lawyer, although he had greater eminence as a seaman. He had captured a prize and converted her into a tender for the *Alabama*. He took her into St. Simon's bay, near Capetown, whereupon the American consul made vigorous protest, and demanded the restoration of the ship, which Semmes had rechristened the *Tuscaloosa*, and based his demand mainly on the fact that there had been no condemnation. The Colonial Secretary replied:

"The Governor is not aware, nor do you refer him to the provisions of the International Law, by which captured vessels, as soon as they enter our neutral ports, revert to their original owners, and are forfeited by their captors. But his Excellency believes, that the claims of contending parties to vessels captured can only be determined, in the first instance, by the courts of the captor's country" (Semmes, *Service Afloat*, p. 663).

Nonetheless, after Semmes left on another cruise, the British authorities seized the *Tuscaloosa*, on the ground that she had violated the Queen's proclamation of neutrality, which had expressly forbidden the right of asylum to both belligerents. Thereupon Semmes wrote to Lord Russell, saying:

"Further, as to this question of adjudication. Your letter to Lieutenant Low, the late commander of the *Tuscaloosa*, assumes that as that ship was not condemned, she was the property of the enemy from whom she had been taken. On what ground can you undertake to make this decision? Condemnation is intended for the benefit of neutrals, and to quiet the titles of purchasers, but is never necessary as against an enemy. He has, and can have no rights in a prize court at all. He cannot appear there, either in person or by attorney. He is divested of his property by force, and not by any legal process. The possession of his property by his enemy, is all that is required as against him. What right, then, has the

British government to step in between me and my right of possession—waiving, for the present the question of the commission, and supposing the *Tuscaloosa* to be nothing more than a prize ship? Does the fact of my prize being in British waters, in violation of the Queen's proclamation give it this right? Clearly not; for we are speaking now of rights under the laws of nations, and a mere municipal order cannot abrogate these. The prize may be ordered out of the port, but my possession is as firm in port, as out." (Semmes, *Service Afloat*, p. 741.)

He carried his point. On March 4, 1864, the Duke of Newcastle wrote:

"I have to instruct you to restore the *Tuscaloosa* to the Lieutenant of the Confederate States, who lately commanded her, or if he should have left the Cape, then to retain her until she can be handed over to some person who may have authority from Capt. Semmes, of the *Alabama*, or from the Government of the Confederate States to receive her" (Semmes, *Service Afloat*, p. 743).

The character of the ship as a public ship is determinative of this case. If as a public ship of the German Empire she committed any wrong against this Government, that would not give rise to any private cause of action against her. If the *Deutschland* while in our ports had been sunk by the negligent or wilful action of another private merchant ship of whatever nationality, her owners could libel that ship and make good their claim against it. It would be a suit between private parties for the redress of a private wrong. If she had been sunk by a warship of the allied powers, a libel against that ship could not be maintained, flagrant as the violation of neutrality would be, because our court would not assume jurisdiction over the foreign sovereign. The case would be one for the two governments to deal with, because the ship and the act complained of would be, as they are here, both of a national character. The adjustment

might involve compensation to the injured owners, but this would be because the governments agreed upon it.

The case presented by the libellant is that of an alleged violation of our neutrality, not by the *Moewe*, a German ship of war in taking the *Appam*, but by the *Appam* herself, after she had become a public ship, and, as libellants contend, a ship of war of the German government. This alleged breach of neutrality consisted in nothing done against the libellant, but in the mere act of crossing the line, that marked the neutral zone, into our waters. And because of this the libellant seeks redress against that public ship for a capture of its ship previously made upon the high seas in the course of war and as a valid act of war. It is plainly a suit by a private corporation against a foreign sovereign power, which our courts will not proceed with farther than to ascertain its nature. If there was any breach of neutrality, which we deny, that is a matter between the two governments in which the libellant has no concern.

## X.

THE PRIZE MASTER WAS AUTHORIZED BY THE TREATY EXISTING BETWEEN THE UNITED STATES AND GERMANY TO BRING THE PRIZE INTO OUR PORTS.

We have considered the case thus far entirely upon principles of international law, but there are treaties involved which are of the highest significance and importance in this connection. They are three in number, and were concluded between the United States and Prussia. The original drafts in each case were in the French language. We set out the pertinent articles from the English text as contained in our official publications.

The first treaty was in 1785, and Article XIX of this is as follows:

"The vessels of war, public and private, of both parties, shall carry freely wheresoever they please

the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees, to officers of admiralty, of the customs, or any others, nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew. But no vessel which shall have made prizes on the subjects of His Most Christian Majesty the King of France shall have a right of asylum in the ports or havens of the said United States; and if any such be forced therein by tempest or dangers of the sea, they shall be obliged to depart as soon as possible, according to the tenor of the treaties existing between his said Most Christian Majesty and the said United States."

Treaties (Malloy), vol. II, p. 1483.

Another treaty was concluded between the two nations in 1790, the 19th article of which is as follows:

"The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew.

"But conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger, or accident of the sea, they shall be obliged to depart as soon as possible."

Treaties (Malloy), vol. II, pp. 1492, 1493.



A third treaty was concluded between the two nations in 1828, Article XII of which is as follows:

"The twelfth article of the treaty of amity and commerce, concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth, inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to the treaties with Great Britain, are hereby revived with the same force and virtue as if they made part of the context of the present treaty, it being, however, understood that the stipulations contained in the articles thus revived shall be always considered as in no manner affecting the treaties or conventions concluded by either party with other Powers, during the interval between the expiration of the said treaty of 1799, and the commencement of the operation of the present treaty.

"The parties being still desirous, in conformity with their intentions declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime Powers, further provisions to ensure just protection and freedom to neutral navigation and commerce, and which may, at the same time, advance the cause of civilization and humanity, engage again to treat on this subject at some future and convenient period."

Treaties (Malloy), vol. II, pp. 1499, 1500.

It is the contention of the libellant that the privilege of harbor and asylum accorded by these treaties is limited to vessels of war and to prizes which they have taken and convoyed into our ports and does not extend to prizes sent in by their captors. The Secretary of State expressed this view in his letter to the German Ambassador, saying that "by a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war" (R., p. 18).

Supporting this view counsel for libellants lay stress upon the word "carry" as contained in the officially published

translations of the treaties. To "carry" they say is not to send, but to convoy. The word "convoy," however, is not in the English version of the treaty, and the French word which has been translated "carry" is "conduire." Something more than "convoy" was intended by the Americans, for they did not use that word and they did use a word of larger significance.

Few words in the English language are limited to a single definite meaning, and "carry" is not one of them. There are many ways of carrying things. "Carry" is properly enough used to designate the act of conveying a thing from one place to another and it is properly applicable to any means of accomplishing that result.

We shall consider presently the intention of the parties, and their use of this word and of other words as its equivalent, from which it will appear that the word was an apt one and broad in its scope as their purpose was.

Nearly three columns of the Century Dictionary are taken up with the definition of carry. In seventeen different paragraphs there are as many different meanings assigned to it, and all approved by ancient, established use. If we take the word in its primary significance of the bodily bearing of something from one place to another, the treaty is absolutely nullified, for that would require that the prize, like the cargo, be borne upon the decks or in the hold of the captor ship. We are told that Agathocles carried the war into Africa, but this does not mean that he took it up in his arms and bore it there, as Æneas upon his shoulders, did from the flames of Troy the old Anchises bear. It does not necessarily mean that he led his army in person, or even accompanied it to Africa. In general usage the word is applicable to any method of attaining a desired result. A man carries his point, his purpose or programme, and so direct, conduct, urge, impel, compel, force or project may, any of them, be the equivalent of carry. We speak of a gun carrying so many miles, when literally it does not carry

its missile at all, but recoils in the other direction. So it would be a correct use of English for Count Dohna to say that he had carried the *Appam* into Hampton Roads, for it was by his orders and direction that she was taken there. His purpose was to get her into an American port, and he carried out his purpose.

As words are flexible, they must always be considered with reference to the purpose of their use. So far as prizes are concerned, the article deals with their privileges and immunities in our ports. They may be carried wheresoever the captors please, "without being obliged to pay any duties, charges or fees to officers of admiralty, of the customs, or any others, and such prizes shall not be arrested, searched or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again at anytime by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew." The right to come into port and the immunity while there constitute the substance of the article; not the manner of their coming in, whether brought or sent. The word "carry" is used too as an equivalent for "come to and enter." The captor may carry the prizes whithersoever he pleases, and they shall enjoy the immunities stated when they "come to and enter the ports," and they may be "carried out again," etc., etc. The way of coming in is stated differently from the way of going out, but surely a different manner was not intended. They may come to and enter, and we might say that this implies action only by the prize. They may be carried out, and we might say that this implies convoy. But this is to sever and divide a hair twixt north and northwest side. There is in all this nothing material to the purpose of parties who were each desirous of shelter for their warships and prizes in the ports of the other, and to obtain this were willing to reciprocate, and each to grant the shelter of its own ports to the warships and prizes of the other.

However the vessel may be brought into port, bringing her in is the act of the captor.

"If the circumstances of the captured vessel be such as to do away all apprehension of rescue, and inspire confidence that the crew will bring her into port, no reason is perceived why the property of the captor may not be retained as well by a prize master alone as by a considerable detachment from his crew. The cases cited to this point by the counsel for the captors are entirely satisfactory." *The Alexander*, 8 Cranch, 169 l. c. 180.

And in the *Eleanor*, 2 Wheat., 345, it is said that "the prize master may be considered as bailee to the use of the whole squadron who share in the prize-money."

The word "carry" has been used by the English courts in a prize case to denote sending in a prize in charge of a prize crew and without a convoy. In the case of *The Felicity*, 2 Dods., 381, s. c. 2 Roscoe's Prize Cases, 233, Sir William Scott, later Lord Stowell, used the word "carry" in the same sense in which we contend Count Dohna carried the *Appam* into Hampton Roads. The *Felicity* was a United States vessel, captured by a British cruiser during the War of 1812, and destroyed by the commander of the captor vessel upon the ground that he was expecting battle with an American man-of-war and did not wish to lessen the strength of his crew by sending in the *Felicity* under a prize crew. In the course of his opinion Sir William Scott said:

"Here is a clear American vessel and cargo, alleged by the claimants themselves to be such, and consequently the property of enemies at that time. They share no inconvenience by not being brought in for the condemnation, which must have followed if it were mere American property; and the captors fully justify themselves to the law of their own country, which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port. Under this collision of duties nothing was left but to destroy her,

for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to *bring in*, their next duty is to destroy enemy's property."

It is interesting to note that Sir William Scott used the words "carry" and "bring in" interchangeably.

The Commission which negotiated these treaties was remarkable and distinguished in its personnel—Franklin, Adams and Jefferson. They knew the value of words. But they were statesmen and not logomachists. They used words expressively and not repressively. They were not given to making distinctions where there were no differences. In all the correspondence leading up to these treaties we have seen nothing to suggest that on either side it was deemed material whether a prize was brought in alone, by the prize crew, or whether it was brought in by the captor vessel. Everything indicates that it was all one to the parties how the prize got into port so long as it got there. Therefore the same word might well be used to describe either mode. Convoys are often referred to, but always as an escort to protect an unarmed vessel against the enemy. There were convoys for merchant vessels and convoys for prizes, when there was danger of capture. We have found no case, however, in which a convoy was sent for the discipline of the crew of the vessel which it was escorting. There was no suggestion in the correspondence of the time that the convoy conducted a prize into neutral ports for the purpose of maintaining discipline in the prize crew while in the neutral port, and no suggestion that the presence of two crews in the port, the crew of the convoy and the crew of the prize, would be less objectionable for any reason than the presence of but one of the crews. And so our Commissioners abroad used the words "carry" and "sent" indifferently to describe the taking of a prize into port, whether with or without convoy. Writing of the Bergen affair to Count de Vergennes on March 3, 1782, Franklin said:



"These vessels were fair and good prizes, which had been made by our ships of war, not on the coast of Denmark, but far distant on the high seas and *were sent into Bergen* as into a port truly neutral, but there, contrary to the laws of hospitality, as well as the other laws of nations, they were forcibly wrested out of our hands by the government of that place, and delivered back to our enemies."

7 Franklin Works, Ed. John Bigelow, 397.

In a minute of their proceedings, as ministers plenipotentiary on August 30, 1784, Franklin, Adams, and Jefferson speak of these prizes as taken by Jones and "*carried into Bergen.*" 2 Dip. Corr. of the U. S., p. 196. Jones himself in a letter to the Marechal de Castries, of date, February 18, 1784, speaks of them as "*sent into port.*" 7 Dip. Corr. of the U. S., p. 294.

Franklin never distinguished between prizes convoyed by the captor vessels and prizes sent in under prize masters, for on January 16, 1778, when Spain and France were neutrals and at peace with England, he and Silas Deane instructed John Paul Jones as follows:

"If you take prizes on the coast of France or Spain, *send* them into Bilboa, or Corogne, unless you should apprehend the danger too great, in which case we advise you to *send* them into L'Orient or Bordeaux, directing the officers, who may have them in charge, to apply at L'Orient to M. Moylan, or M. Goulade, and inform us immediately of their arrival and situation. If you *send* to Spain or *should put* into the ports of that kingdom, apply at Bilboa to Messrs. Gardoqui & Sons; at Corogne, to Messrs. Leagonere & Co."

1 Sparks' Dip. Corr. of the American Revolution, p. 361.

In just a little over twelve months after the treaty of 1785 was signed, one of the American signatories to that treaty construed the word "carry" to designate the sending in of a prize into a neutral port under a prize crew without convoy,

for on August 18, 1786, Jefferson, writing to the Baron de Blome tells him of the application made by Franklin to the Court of Denmark "for a compensation for certain vessels and cargoes taken from the English during the late war, by the American squadron under the command of Commodore Paul Jones, *carried* into a port of Denmark, and by order of the Court of Denmark redelivered to the English" (2 Jefferson's Works, p. 13, Ed. H. A. Washington) Congress itself on October 26, 1787, makes an order "relative to the prizes taken during the late war and *sent* to Denmark" (7 Dip. Corr. of the U. S., p. 364). Congress, again, in an act approved March 28, 1806 (6 Stats., L. 61), giving prize money to Landais, one of Jones' captains, did so "on account of his claim to prize money accruing from certain captures made and *carried* into Bergen."

It is in each case the same transaction, three prizes taken by Jones and brought into Bergen without convoy by prize crews. Adopting the principle of construction applied by counsel for libellants to the Prussian treaty, and the prizes taken by Jones were sent into Bergen, and so properly surrendered to Great Britain by Denmark, but according to Jones himself and to Adams, Franklin and Jefferson and the Continental Congress, they were sent in or carried in, as you please to phrase it, and whether properly described as sent or carried, were improperly given up to Great Britain.

So much for verbal criticism. More to the purpose is, what was wanted by our people in the treaties negotiated in the early and struggling days of our nationality when we were seeking help from whatever quarter we might hope to get it.

The treaty is to be construed in view of the circumstances and conditions which prompted to its adoption. Vattel says, Book II, ch. 17, sec. 287:

"The reason of the law, or of the treaty, that is to say, which led to the making of it, and the object in contemplation at the time, is the most certain

clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous indeterminate passage in a law or treaty, or of applying it to a particular case. When once we certainly know the reason which alone has determined the will of the person speaking, we ought to interpret and apply his words in a manner suitable to that reason alone; otherwise he will be made to speak and act contrary to his intention, and in opposition to his own views."

Vattel, Book II, ch. 17, sec. 287.

"Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred."

Hauenstein *vs.* Lynham, 100 U. S., 483.

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers and, intended for their mutual protection, should be interpreted in a spirit of *inberrima fides*, and in a manner to carry out its manifest purpose."

Tucker *vs.* Alexandroff, 183 U. S., 424.

So we must consider the circumstances under which our treaties were made and that they were made at our solicitation and for our advantage. We were not then a world power, nor were we a great power upon the seas. And yet we were not strangers there, for there were mariners of New England as well as mariners of Old England. The waves that beat upon the Atlantic shores invited to adventure and the achievements of Jones, Barry and Hopkins gave hope that we might have our place upon the main as well as upon the land. The contest in which we were engaged was an unequal one. Great Britain had dotted the globe with her possessions, and in every quarter she had ports of her own convenient for the taking in of prizes. But if

our sailors ventured, like Paul Jones, to leave our coast and carry the war to the British shores, there was no port of the United States to which prizes might be sent without crossing the Atlantic. Our Government wanted as much as possible to equalize opportunities. A number of the nations of Europe were well disposed, France especially so. Frederick the Great of Prussia, not as much interested as France, was nevertheless friendly. Steuben and DeKalb, officers of his army, had rendered valuable service in our struggle for independence, and he had forbidden the passage of mercenaries, employed to fight against us, through his dominions. His interest in maritime questions was small. Prussia had no ocean traffic and it had no navy.

We began our effort in 1777 and succeeded first with France, concluding a treaty with that country on February 6, 1778. The seventeenth article of this treaty is the pertinent one. As translated in our government publications it reads:

"It shall be lawful for the ships of war of either party, and privateers, freely to carry whithersoever they please the ships and goods taken from their enemies, without being obliged to pay any duty to the officers of the admiralty or any other judges; nor shall such prizes be arrested or seized when they come to and enter the ports of either party; nor shall the searchers or other officers of those places search the same, or make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to show; on the contrary, no shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people or property of either of the parties; but if such shall come in, being forced by stress of weather, or the danger of the sea, all proper means shall be vigorously used, that they go out and retire from thence as soon as possible."

Treaties (Malloy), vol. I. p. 474.

The rights accorded here are plainly to ships of war and privateers, and to their prizes. How the prizes were brought in, whether under convoy of the captor ship or of some other ship appointed thereto, or whether by a prize crew, is manifestly immaterial. There is a broad, unqualified exemption of the prizes themselves from arrest and seizure and even "examination concerning the lawfulness of them."

This certainly was the understanding of Franklin, for on June 30, 1779, he wrote to Jones, saying:

"Being at Guaix, you are to make the best of your way with the vessels under your command to the west of Ireland, and establish your cruise on the Oreades, the Cape of Derneus and the Dugger bank, in order to take the enemy's property in those seas. The prizes you may send to Dunkirk, Ostend or Bergen in Norway, according to your proximity to either of those ports. Address them to the persons M. de Chaumont shall indicate to you."

Senate Reports, 63, 29th Congress, 2nd Session, page 5.

Here were designated ports of an ally and of neutrals, and the direction was to *send in* the prizes, the purpose manifestly being that Jones should continue his cruise and not terminate it with the first prize he made.

Another feature of this French treaty is to be considered.

It was stipulated after providing for shelter to prizes made by each of the parties in the ports of the other, that "on the contrary, no shelter or refuge shall be given in their ports to such as shall have made prizes of the subjects, people or property of either of the parties," etc.

It was plainly the intent here that the United States should withhold from the enemies of France, and that France should withhold from the enemies of the United States the privileges they had granted to each other. The thing granted in the one case was the thing withheld in the other. If the grant is to be construed narrowly as counsel contend, then what is withheld is restricted accordingly. If a prize



made by the United States could not come into a port of France for asylum, if coming alone, because the grant of asylum was only to warships and prizes convoyed by them, then prizes of an enemy of the United States could seek asylum in the ports of France, because the asylum was withheld only from such ships "as shall have made prizes of the subjects, people or property" of the United States. We venture to say that if either party had in practice put such a construction upon the negative side of the treaty, the other would have deemed it an evasion or rather a violation of it.

Such certainly was Hamilton's opinion, for in a letter of instructions to Collectors of the Customs, issued by him August 4, 1793,—before the British treaty was negotiated—and found 1 Am. State Papers, Foreign Relations, p. 140, he said, with reference to the war existing between France and other European powers, in which we were neutral:

"There are some other points which, pursuant to our treaties, and the determination of the Executive, I ought to notice to you.

"If any vessel of either of the Powers at war with France should *bring* or *send* within your district a prize made of the subjects, people or property of France, it is immediately to be notified to the Governor of the State, in order that measures may be taken, pursuant to the 17th article of our treaty with France, to oblige such vessel and her prize, or such prize, when sent in without the capturing vessel, to depart."

The year 1793 was one of great embarrassment and difficulty for our State Department. The French minister Genet, asserted and for a time exercised powers inconsistent not only with our neutrality in the war between England and France, but inconsistent as well with our sovereignty. He fitted out privateers in our ports, captured British vessels in our waters and set up prize courts in our cities where he assumed to condemn and sell the captured ships. Jefferson was Secretary of State and had occasion to consider carefully our treaty relations with France. The sixth

volume of the 1895 edition of Jefferson's writings is taken up in large part with letters to Genet, and to others about what Genet was doing.

The right to equip vessels of war in our ports, to take British ships in our waters and to set up prize courts in our cities was, of course, absolutely denied, but the right to bring in prizes lawfully made on the high seas was conceded as accorded to France by the treaty of 1778, and the like right was denied to Great Britain, because precluded by the same treaty. During all this time, prizes were brought in and were sent in, but there is nothing in any of Jefferson's correspondence to indicate that it made any difference whether a prize was "carried" or "sent" in. If the ship was lawful prize it was entitled to shelter in our ports; if our neutrality had been violated in the capture it was not. In an opinion on French treaties (vol. 6, Jefferson's Writings, p. 223), he refers to the 17th article of the treaty of 1778, which he says, "admits French ships of war and privateers to come and go freely, with prizes made on their enemies, while their enemies are not to have the same privilege with prizes made on the French." But he says nothing to suggest that the mode of bringing in the prize has any significance whatever.

On June 29, 1793, he writes to Genet concerning a French privateer which had captured "the brigantine *Fanny*, within the limits of the protection of the United States, and *sent* the said brig as a prize into this port, where she is now lying" (p. 329 note). The complaint is obviously of the taking of the ship in our waters, and not of the way of bringing her into our port.

On July 18, 1793, Jefferson formulated a series of questions on behalf of the Cabinet, to be submitted to this court, calling for a construction of our treaty relations and especially those with France. These questions, seventy-nine in number, cover every possible phase of controversy, but there is nothing in them as to difference of right in case of a prize

"carried" in and one "sent" in (6 Jefferson's Writings, 351, *et seq*).

August 15, 1793, Jefferson formulated the Cabinet opinion that "besides taking efficacious measures to prevent the future fitting out of privateers in the ports of the United States, they will not give asylum therein to any which shall have been at any time so fitted out, and will cause restitution of all such prizes as shall be hereafter brought within their ports by any of said privateers" (vol. 6, p. 370). Not a word here of restitution of prizes lawfully made and "sent" into our ports.

On the next day he wrote to Morris, our minister to France:

"But the U. S., at the same time, do not pretend any right to try the validity of captures made *on the high seas*, by France, or any other nation, over its enemies. These questions belong, of common usage, to the sovereign of the captor, or whenever it is necessary to determine them, resort must be had to his courts. This is the case provided for in the 17th article of the treaty, which says, that such prizes shall not be arrested, nor cognizance taken of the validity thereof, a stipulation much insisted upon by Mr. Genet and the consuls, and which we have never thought of infringing or questioning.

"The real question is, whether the U. S. have not a right to protect vessels within their waters and on their coasts" (vol. 6, p. 383).

Here again is an explanation why our courts decree restitution only when the capture itself is illegal.

No question, if there has been a valid capture on the high seas, as to how the prize came into our ports.

September 9, 1793, he wrote to the British minister:

"France, England, and all other nations, have a right to cruise on our coasts—a right, not derived from our permission, but from the law of nature. To render this more advantageous, France has secured to herself, by treaty with us (as she has done also, by a

treaty with Great Britain, in the event of a war with us, or any other nation), two special rights: 1st. Admission for her prizes and privateers into our ports. This by the seventeenth and twenty-second articles, is secured to her exclusively of her enemies, as is done for her in the like case by Great Britain, were her present war with us, instead of Great Britain" (vol. 6, p. 423).

In the case of the British ship *Rochampton*, taken and sent into Baltimore by a French privateer, whose force it was suggested had been augmented at Baltimore, Jefferson wrote to the British minister on November 14, 1793:

"Before I proceed to the matters of fact in this case, I will take the liberty of calling your attention to the rules which are to govern it. These are, 1, That restitution of prizes has been made by the Executive of the United States only in the two cases, 1st, of capture within their jurisdiction, by armed vessels, originally constituted such without the limits of the United States; or 2nd, of capture, either within or without their jurisdiction, by armed vessels, originally constituted such within the limits of the United States, which last have been called proscribed vessels" (vol. 6, p. 444).

This policy of the United States was announced by President Washington in his message to Congress, December 3, 1793:

"Although I have not thought myself at liberty to forbid the sale of the prizes permitted by our treaty with France to be brought into our ports, I have not refused to cause them to be restored when they were taken within the protection of our territory, or by vessels commissioned or equipped in a warlike form within the limits of the United States."

1 Messages of the Presidents (Richardson), p. 139.

Thus Washington held the sale of French prizes in our ports to be among the privileges accorded to France by the

treaty, something entirely inconsistent with the view that a prize could be brought in only under convoy and must depart with her convoy.

This early construction of the treaty with France by our Government, and by men who themselves negotiated treaties on behalf of the United States, in which the same, or substantially the same stipulations were contained, is entitled to the highest consideration. They knew what they intended—shelter in convenient ports of the one party for prizes lawfully made by the other. There is an obvious reason for the limitation they imposed upon the article in question. They would not give shelter to prizes made in violation of their neutrality, for this would be to sanction such violation and to participate in it. But it is no more a violation of neutrality to give shelter to a prize lawfully made and sent into port, than to give such shelter to one lawfully made and convoyed into port. There is nothing in international law or in national policy offended by one ship of a belligerent seeking asylum here more than by two such ships seeking that asylum. The whole is inclusive of all its parts. The treaty which grants shelter to a vessel of war with its prize, grants it to the vessel of war and to the prize. The captor ship might sink as the result of the fight in which the capture was made, as the *Bon Homme Richard* did sink, but that would not deny shelter to the *Serapis* if Jones should seek it in a French harbor. There appears to us to be no good reason why that which is certainly granted to both captor and prize was not intended for each as well as for both.

And our courts at the same time held the view that the terms of the French treaty applied to prizes made by France whether they were brought in under convoy or sent in under a prize crew. In *Solderondo vs. The Nostra Signora, etc.*, 21 Fed. Cas., 225, and *Reid vs. Vere*, 20 Fed. Cas., 488, the prizes were brought into our ports without convoy. None the less, article XVII. of the French treaty was held to protect them.



The treaty with The Netherlands, concluded October 8, 1782, extended the right to harbor and shelter to "the subjects or people of either party, with their shipping, whether public and of war, or private and of merchants" (Art. XVII). *Treaties* (Malloy), vol. II, pp. 1238, 1239. This was designed to be comprehensive of ships of every class. The Netherlands had previously permitted Jones to take prizes into the Texel and to keep them there for some months, a precedent of which Holland reminded us when we demanded surrender of a Confederate prize (3 Wharton, *Int. Law*, 527).

Our next treaty on this subject was with Sweden and was concluded April 3, 1783. Article 19 was as follows:

"The ships of war of His Swedish Majesty and those of the United States, and also those which their subjects shall have armed for war, may with all freedom conduct the prizes which they shall have made from their enemies into the ports which are open in time of war to other friendly nations; and the said prizes upon entering the said ports shall not be subject to arrest or seizure, nor shall the officers of the places take cognizance of the validity of the said prizes, which may depart and be conducted freely and with all liberty to the places pointed out in their commissions, which the captains of the said vessels shall be obliged to shew."

*Treaties* (Malloy), vol. II, p. 1732.

This certainly does not make the immunity of prizes from arrest and seizure depend upon their coming in under convoy. It means plainly that the ships of war may come and their prizes also. The provision is broad and inclusive, and it is not narrow and exclusive. It extends to ships of war, privateers and prizes. It might more forcibly be argued that under this article a ship of war or privateer was not to be admitted to a port unless it had a prize in charge.

This treaty is important, as it was taken by Prussia as a model (8 Works of John Adams, 183, 191, 193).

The pressure for the treaty with Prussia, and especially for the provision of harbor and shelter to ships of war and their prizes, was all on our side. The United States from the beginning had aspirations to sea power, and from the beginning they endeavored to secure such treaties, with as many nations as possible, as would promote their aspirations.

Writing to the Continental Congress in 1777, Franklin and Deane said:

"Mr. Lee tarried here some time after his return from Spain. No news arriving, (though we received letters from you) of any commissioner being actually appointed for Prussia. and the necessity of a good understanding with that court, *in order to obtain speedily a port in the northern seas, appearing more and more every day, on various occasions*, he concluded, with our approbation to set out for Berlin, which he did about a week since, and we have reason to hope good effects from that journey" (2 Wharton Dip. Corr., Am. Rev., 322).

And Arthur Lee, after his arrival in Berlin on July 29, 1777, wrote:

"Accordingly I ventured in a little time to propose *the opening of their ports to our cruisers, and allowing the sale of prizes*. I was assured in answer to this proposition, that they would inquire upon what footing this was done in France and Spain, and inform me whether the same would be admitted in their ports."

(Sparks, Dipl. Corr. of Rev., vol. 2, p. 88.)

Prussia hesitated, but not from any hostility to the United States, as may be seen from a letter of Baron Schulenburg written to Lee on January 16, 1778:

"His Majesty would not, moreover, make the least difficulty in receiving your vessels into his ports, were it not that he has not a fleet to resent the affronts which might be shown there to your ships; the port

of Embden, however fine and secure it is, has not even a fort to defend it. He will not, therefore, expose himself to the disagreeable consequences."

Wharton, *Dip. Corr. of Rev.*, vol. 2, p. 472.

Frederick was unwilling to accord rights which he could not safeguard, that is, to grant harbor to American ships when this meant simply to expose his own country to indignity and injury, from the invasion of his ports and the taking away or destruction of ships to which he had given shelter. But the representatives of the United States were persistent.

March 14th, 1785, Adams, Franklin and Jefferson wrote a joint letter to Baron Thulemeier urging the adoption of Article XIX of the treaty in which they said:

"The practice of carrying prizes into neutral ports and there selling them is admitted by the usage of nations and can give offence to none, who have not guarded against it by particular contract. Were the clause now under consideration to be so changed, as to exclude the prizes made on the enemies of either, from being sold in the ports of the other, and that kind of stipulation to take place generally, it would operate very injuriously against the United States in cases, wherein it is not presumed his Majesty would wish it. For suppose them to be hereafter in war with any power in Europe, their enemy, though excluded from the ports of every other State, will yet have their own ports at hand, into which they may carry and sell the prizes they shall make on the United States; but the United States, under a like general exclusion, having no ports of their own in Europe, their prizes in these seas must be hazarded across the ocean to seek a market at home; an incumbrance which would cripple all their efforts on that element, and give to their enemies great advantage over them." 2 *Dip. Corr. of the U. S.*, 276.

Baron Thulemeier answered this on May 3, 1785, saying:

"His Majesty approves the 19th article as it was last drawn up: 'That armed vessels of either of the two nations, will be allowed to enter, with the prizes taken from their enemies, into the ports of the other, to depart freely or sell them there.'

"He flatters himself that the United States will appreciate this condescension, and will perceive the desire of his Majesty to give them proofs of friendship, inasmuch as he does not equip cruising vessels, and that consequently his subjects are not enabled to make prizes at sea." 2 Dip. Corr. of the U. S., 304.

There is not a line in the correspondence of this country with any of the nations with which it sought to make treaties providing asylum for prizes, to indicate that the manner in which the prize came in, whether sent or carried, whether under convoy or alone, was of the slightest significance. And so at last the treaty with Prussia was concluded in 1785, responsive to our solicitation, and to meet the exigencies of our situation as developed during the Revolutionary war, and to obviate the injustice experienced by John Paul Jones in the surrender to Great Britain of the prizes *sent* by him into Bergen under prize-masters and without convoy; in other words, exactly the case of the prize taken by Count Dohna and sent by him into Hampton Roads under the charge of Hans Berg, prize-master and appellant in the case at bar.

True it is, that in the treaty with Prussia the reciprocal grant by each of the parties to the other to its ports, as places of harbor and shelter for the warships *and* prizes of the other, was made at the strenuous insistence of the United States, and, at that time, for the exclusive benefit of the United States, for Prussia had then no place on the seas, still it was urged upon Prussia as of possible benefit to her in the future, as now it proves to be.

The treaty thus concluded was hailed by us as a great diplomatic achievement. Washington, writing to Rochambeau concerning it on July 31, 1786, said:

"The treaty of amity, which has lately taken place between the King of Prussia and the United States, marks a new era in negotiation. It is the most liberal treaty, which has ever been entered into between independent powers. It is perfectly original in many of its articles; and should its principles be considered hereafter as the basis of connection between nations, it will operate more fully to produce a general pacification than any measure hitherto attempted amongst mankind" (9 Sparks' Writings of Washington, 182-3).

And Hamilton, writing in 1795, said:

"Our treaty with Prussia \* \* \* is indeed a model of liberality, which for the principles it contains, does honor to the parties, and has been in this country a subject of deserved and unqualified admiration" (5 Hamilton Works, ed. Henry Cabot Lodge, 113).

The treaty with England negotiated by John Jay was signed November 19, 1794. It contained the following article:

#### ARTICLE XXV.

"It shall be lawful for the ships of war and privateers belonging to the said parties respectively to carry whithersoever they please the ships and goods taken from their enemies, without being obliged to pay any fee to the officers of the admiralty, or to any judges whatever; nor shall the said prizes, when they arrive at and enter the ports of the said parties, be detained or seized, neither shall the searchers or other officers of those places visit such prizes, (except for the purpose of preventing the carrying of any of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation, or commerce,) nor shall such officers take cognizance of the validity of such prizes; but they shall be at liberty to hoist sail and depart as speedily as may be, and carry their said prizes to



the place mentioned in their commissions or patents, which the commanders of said ships of war or privateers shall be obliged to show. No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of said parties; but if forced by stress of weather, or the dangers of the sea, to enter therein, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this treaty contained shall, however, be construed or operate contrary to former and existing public treaties with other sovereigns or States. But the two parties agree that while they continue in amity neither of them will in future make any treaty that shall be inconsistent with this or the preceding article.

"Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other to be taken within common shot of the coast, nor in any of the bays, ports or rivers of their territories, by ships of war or others having commission from any Prince, Republic or State whatever. But in case it should so happen, the party whose territorial rights shall have thus been violated shall use his utmost endeavors to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels."

Treaties (Malloy), vol. I, p. 604.

The restrictive article of the Jay treaty was in plain conflict with the French and Prussian treaties. We were, or soon got into trouble with France, because of her unwarranted assertion of powers of sovereignty within our borders, and so did nothing at the time to remove this conflict in the treaties with her. With Prussia we continued at peace, and in 1799 made a new treaty, in which we modified article XIX. of the original treaty by adding to it the exception that "conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of

the United States." We submit that this treaty as thus modified meant that this shelter, which generally we allow to Prussian warships and the prizes they have made, is not effective as against Great Britain. It did not mean that we withhold this shelter in the case of ships of war which have made British prizes, but continue it as to the prizes themselves.

In 1807 article XXV. of the Jay treaty expired and it was not revived. Trouble was brewing, and soon came the war of 1812, with its inconclusive and unsatisfactory results. The Jay treaty was held by Great Britain to be abrogated altogether, and prizes and their captors were not again the subject of any treaty concluded with Great Britain.

We were free now of any treaty obligations to Great Britain and, being so free, in 1828 we made a new and third treaty with Prussia, in which we revived the treaty of 1799, deliberately, however, eliminating therefrom that provision which excluded harbor to men-of-war which had made prizes upon British subjects, and which, we insist, excluded the prizes also, however they might come in. And when that provision was eliminated we opened our ports to Prussian men-of-war and to prizes which they had taken. We revived article XIX as it was in 1785, with all the breadth and scope then intended, to be construed as that was construed, for now after forty-three years we repeated its provisions in their exact terms.

Ships of war were still built of wood. Thirteen-inch guns were unknown, and while some ships then went under the water, they never came up again. No change in purpose at that time was to be inferred from any change of conditions.

In 1870 came the war between France and the North German Confederation. President Grant recognized the treaty as an existing one between this country and the German Confederation. In his proclamation enjoining neutrality upon our people he enumerated various forbidden acts, and then explicitly declared that the nineteenth article of the treaty of 1799 as modified by the elimination of the paragraph excluding ships that had made prizes upon British subjects was still in force, reciting the article in full.

One provision of this treaty of 1828 is to be taken into account, and that is:

#### ARTICLE XV.

"The present treaty shall continue in force for twelve years, counting from the day of exchange of the ratifications; and if twelve months before the expiration of that period, neither of the high contracting parties shall have announced, by an official notification to the other, its intention to arrest the operation of said treaty, it shall remain binding for one year beyond that time, and so on until the expiration of the twelve months, which will follow a similar notification, whatever the time at which it may take place."

Treaties (Malloy), vol. II, pp. 1500, 1501.

A treaty like this, terminable at any time, and continued by the consent of the parties throughout a hundred years, is continued in its original sense and significance, particularly so when, as here, there has been no material change in the situation which induced the article in question. We have, it is true, somewhat extended our dominion, but Germany is still confined to its ports in the home country, while England retains all the advantage she had when the treaty was made, for she still has her ports in every quarter of the globe.

Bringing the *Appam* into our port was just the kind of advantage the United States wished to secure by the treaty, and which reciprocally was granted to Prussia, and which Prussia was assured by our representatives she would some day find of great benefit. And now it is attempted to restrict the scope and application of the treaty, by laying stress, not upon the bringing in of prizes, but upon the manner of bringing them in. The situation of the parties as to ports, convenient for the bringing in of prizes, which they wished to improve by the treaty, existed as much for prizes sent in as for those taken in. Convenient ports for prizes meant less destruction of them upon the seas. The immediate grievance

felt by the United States, and urging always to the treaty, was the denial of harbor to prizes which Jones had sent into Bergen.

In reliance upon this treaty, Count Dohna sent the *Appam* to our shores. For more than a century it had stood, a thing of potential advantage to both parties. Now when its benefits are invoked for the first time by Germany it should not be renounced. There is in the observance of the treaty no violation of neutral duty to England. The treaty requires no discrimination in favor of Germany. Like privileges may be accorded to Great Britain. Such things are for our Government to determine. They do not concern the libellant. Whether Count Dohna was right or wrong in his view that the *Appam* might enter our ports cannot affect this suit. If she had no right to come to and enter our waters, coming here was not an injury to the libellant. That was the concern of our Government which might order her out and, if she failed to go, intern her, or take such other measures as to it seemed proper, but it gave no right to the original British owner, nor could it divest this proceeding of its quality as a suit by an individual against a sovereign power.

Our Government has acted in this view in the present case. The libellants introduced as evidence in the district court the letter of Secretary Lansing to the German Ambassador, in which he gave his reasons for declining to instruct the United States Attorney "to take such steps as may be necessary and proper to secure the prompt dismissal of the libel" (R., 17-19).

But the correspondence between the German Ambassador and the Secretary is not the whole of the diplomatic history of the case.

There was very pertinent correspondence between the English Ambassador and the Secretary, of which counsel for appellants were not aware at the time of the trial in the district court, for it had not then been made public, and counsel for libellant, if aware of it, did not see fit to bring it

forth. Since the trial it has been published and is now a part of our public history, of which the court will take judicial notice, and so it is proper to call it to the attention of the court, all the more so that the case is triable *de novo*. The correspondence is to be found in Dipl. Corr. of Dept. of State, European War, No. 3, p. 341, *et seq.*, and is as follows:

*British Ambassador to the Secretary of State.*

BRITISH EMBASSY,  
WASHINGTON, March 31, 1916.

MY DEAR MR. SECRETARY: On February 3rd last, I had the honour, under instructions from my Government, to request that if the *Appam* were regarded by the United States Government as a prize she should be restored to her owners and the prize crew interned.

Since that date it has come to my knowledge that a proceeding has been brought in the Admiralty Court of the United States by the owners of the vessel for its restitution and that the court has taken jurisdiction of the suit. It appears that the vessel had been detained in an American port by the prize crew for more than two weeks before suit was instituted. I am informed that the vessel was in a seaworthy condition when brought into port and that the time which elapsed before the beginning of the suit was more than sufficient to supply any deficiencies of coal and provisions. The detention of the vessel for such a period of time was therefore a violation of the neutrality of the United States under the Law of Nations as expressed in Articles 21 and 22 of Convention 13 as formulated at The Hague in 1907 and as previously understood and applied among the nations.

I understand that the Admiralty Courts of the United States have jurisdiction to decree the restitution to the owners of a prize brought into an American port by a belligerent captor when there has been a violation of American neutrality on the part of the captor. It seems to me desirable and proper that such violation of American neutrality should be called to the court's attention, not only by the private owners of the captured vessel but also by the official representatives of the United States Government.

I have the honour to request that if the United States Government do not see their way clear to direct by executive order, as suggested in my note above referred to, the return of the vessel to her British owners, instructions may be given,



should there be no objection, to the proper representatives of the Department of Justice of the United States to appear in their official capacity before the United States District Court for the Eastern District of Virginia, in which the suit for the recovery of the steamship *Appam* is pending, and to represent to that court on behalf of the Government of the United States that the detention of the steamship *Appam* under the circumstances above set forth constituted a violation of the neutrality of the United States and apply to the court to direct the return of the vessel to her owners upon due proof of their ownership and of the facts constituting the violation of neutrality above set forth.

I am, etc.,

CECIL SPRING RICE.

*The Secretary of State to the British Ambassador.*

DEPARTMENT OF STATE,

WASHINGTON, April 4, 1916.

MY DEAR MR. AMBASSADOR: I have received your formal note of the 31st ultimo, in which you request that as the *Appam* had violated the neutrality of the United States by her staying in port up to the beginning of the suit now pending against her, such violation of American neutrality be called to the Court's attention by the proper representatives of the Department of Justice on behalf of the Government of the United States, and that application be made to the court to direct the return of the vessel to the owners upon due proof of their ownership and of the facts constituting a violation of neutrality.

In reply, allow me to say that as the vessel was in American jurisdiction up until the time of the filing of the suit against her, pending consideration of the question as to whether she was entitled to the privileges claimed for her by the German Government by virtue of Article 19 of the treaty of 1799, and as this Government reached a decision on that question only after the libel had been filed, I am unable to accept your suggestion that the presence of the *Appam* in American waters, in the circumstances, constituted a violation of the neutrality of the United States. Holding this view, I regret that I am unable to comply with your request to have official representations made to the court in the sense of your note under acknowledgment.

I am, etc.,

ROBERT LANSING.

Here is the determination of the political department of our Government expressed tersely and politely, and as politely as tersely, that the United States did not consider "that the presence of the *Appam* in American waters, in the circumstances, constituted a violation of the neutrality of the United States." And so this Government declined to accept the suggestion of Great Britain that it should "apply to the court to direct the return of the vessel to her owners upon due proof of their ownership (which we admit previous to the capture), and of the facts constituting the violation of neutrality above set forth" (bringing the prize into our waters).

It has never been questioned that the treaty of 1799, between Prussia and the United States, as re-enacted by the treaty of 1828, is an existing treaty and contractual obligation between the United States and the German Empire. From the first days of the North German Confederation and the German Empire down to and including this war, both the governments of the United States and Germany have repeatedly stated that the Prussian treaty of 1828 was an existing treaty between Germany and the United States.

The question of Germany's attitude on this subject arose very promptly, for in 1870, Mr. Fish, then Secretary of State, discussed this question in diplomatic correspondence with Baron Gerolt, the German Minister at Washington.

Finally, on February 9, 1871, Baron Gerolt communicated to Mr. Fish, Secretary of State, a telegram from Count Bismarck, saying that the action of Germany in relation to American vessels, would, of course, be governed by the treaty of 1799.

Foreign Relations (1870), pp. 216-217, 194.

Foreign Relations (1871), pp. 403, 407.

In 1883, in a letter dated April 11 of that year, Mr. Frelinghuysen, Secretary of State, wrote to Mr. Sargent, our Minister at Berlin, and referred to article V of the treaty of

1828, between Prussia and the United States, clearly showing that he considered the treaty in force.

Foreign Relations (1883), p. 369.

In 1885, Mr. Bayard, Secretary of State, in a letter to Mr. von Alvensleben, German Minister at Washington, called attention to "the most favored nation clause of the *existing* treaty of 1828, between the United States and Germany."

Foreign Relations (1885), p. 444.

In 1886, Mr. Bayard, then Secretary of State, in a letter to Mr. Pendleton, our Minister at Berlin, stated:

"This appears to be the only sentence in the treaty relating to the status of naturalized American citizens pending the two-years' stay which is referred to in the fourth article of the treaty, and we must, therefore, turn to our treaty with Prussia of 1828, *which is still operative*, for a definition of the status and treatment of American citizens."

Foreign Relations (1887), p. 370.

In 1896, Mr. Jackson, our Ambassador at Berlin, in a letter to Mr. Olney, Secretary of State, said:

"The treaty of 1828 with Prussia has always been considered by the German Government as applicable to the whole of the Empire, although it was made with but a single State."

Foreign Relations (1896), p. 192.

In the same spirit, the German Chancellor, in a session of the Reichstag, declared on February 11, 1899:

"Our trade relations with the United States are based contractually on the Prussian-American treaty of 1828."

Niemeyer, Urkundenbuch zum Seekriegsrecht, part 2, vol. 1, p. 22, s. c. Huberich & King's German Prize Code, p. xxiii.

The fact that the treaty of 1828 is an existing treaty between Germany and the United States has been recognized by both our Secretary of State and by the German Minister for Foreign Affairs in this war.

On May 13, 1915, Mr. Bryan wrote to Ambassador Gerard as follows:

"\* \* \* The United States and Germany are bound together not only by special ties of friendship, but also by the explicit stipulations of the treaty of 1828, between the United States and the Kingdom of Prussia."

Dipl. Corr., Dept. of State, European War, No. 1, p. 77.

In negotiations arising out of the sinking of the *William P. Frye*, Secretary of State Lansing, referring to the treaties of 1799 and 1828, in a note to Ambassador Gerard, dated June 24, 1915, said:

"It seems clear to the Government of the United States, therefore, that whether the cargo of the *Frye* is regarded as contraband or as non-contraband, the destruction of the vessel was, as stated in my previous communication on this subject, 'a violation of the obligations imposed upon the Imperial German Government under existing treaty stipulations between the United States and Prussia.' \* \* \*

In reply, Herr von Jagow, German Minister for Foreign Affairs, referring to the treaties of 1799 and 1828, stated:

"The German Government will promptly pay the amount of indemnity thus ascertained; it expressly declares, however, reverting to what has been stated above, that this payment does not constitute satisfaction for the violation of American treaty rights, but a duty or policy of this Government founded on the existing treaty stipulations."

Secretary Lansing, in answer, on August 10, 1915, said:

"A payment made on this understanding would be entirely acceptable to the Government of the United States, provided also that an arrangement can be agreed upon for the immediate submission to arbitration of the question of legal justification, in so far as it involves the interpretation of *existing treaty stipulations*. There can be no difference of opinion between the two governments as to the desirability of having this question of the true intent and meaning of *their* treaty stipulations determined without delay." \* \* \*

Dipl. Corr., State Dept., European War, No. 2, pp. 185-189.

In the case of *Disconto Gesellschaft vs. Umbreit*, 208 U. S., 570, Mr. Justice Day stated:

"Article 1 of the treaty of 1828, between the Kingdom of Prussia and the United States, is as follows:

\* \* \* "This treaty is printed as one of the treaties in force in the compilation of 1904, page 643, and has undoubtedly been recognized by the two governments as still in force, since the formation of the German Empire."

The question of whether the extradition treaty of 1852, between Prussia and the United States, was an existing treaty between the United States and the German Empire, was considered by this court in the case of *Terlinden vs. Ames*, 184 U. S., 270. The court held that since both the governments had recognized, and continued to recognize, the treaty as still in force, the treaty could not be considered to have been terminated by the formation of the German Empire, but, on the contrary, should now be deemed an existing treaty between Germany and the United States.



## XI.

THE MUNICIPAL LAW OF THE UNITED STATES IS IN ACCORD WITH INTERNATIONAL LAW AS IT HAS BEEN DECLARED BY THIS COURT.

Sec. 14, chap. 321, 35 Stat. at Large, 1090, provides:

"The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser or other armed vessel is increased or augmented \* \* \* contrary to the provisions and prohibitions of this chapter; (*i. e.*, within our territory or jurisdiction), and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; \* \* \* it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to enforce the execution of the prohibitions and penalties of this chapter, *and the restoring of such prizes in the cases in which restitution shall be adjudged,*" etc.

This section is declaratory of the principles of international law as consistently announced by this court, and makes them a part of our municipal law. It confers jurisdiction upon the district courts to administer that law and provides for carrying into effect, by force if need be, the judgments of those courts. Vessels armed and equipped, or whose armament or equipment is augmented within our borders, are dealt with, as they were, in Jefferson's day, as proscribed vessels, and their prizes and as well prizes taken within our waters, are subject to the cognizance of the district courts, and are to be restored to their original owners. A capture

being made by a proscribed vessel or within our waters, there is a breach of neutrality, inherent in the capture, which invalidates it, and a vindication of our neutrality requires redress, which means restoration of the captured property.

But the authority of the court to award restoration is restricted to the two cases, of capture by proscribed vessels and capture within our waters. No other case is by our municipal law made a violation of our neutrality, and whether provided for by treaty or not, it is not an offense against our municipal law for a vessel of a foreign government, whether armed or unarmed, to come into our ports, even though that government may at the time be at war with another government and we at peace with both.

For the unwarranted stay of foreign vessels in our ports due provision is also made by our municipal law. Sec. 15, 35 Stat. at Large, 1091, provides:

"It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary, to compel any foreign vessel to depart the United States in all cases in which by the law of nations or the treaties of the United States, she ought not to remain within the United States."

This section is applicable to vessels of every class, armed or unarmed, and it is exclusive in its application. It does not contemplate previous judicial process and decree. In that respect it is unlike the section with reference to captures within our waters. The President is to determine whether or not, by the laws of nations or by our treaties, the vessel is entitled to remain. If at the same time and in the same case the courts of the country might deal with the question, there would arise at once a conflict of authority between the Judicial and Executive Departments of the Government which we may be sure was not intended by Congress.

There is not found in all the enactments of Congress any

provision authorizing judicial restitution of a prize coming within our ports, when that prize was not taken by a prescribed vessel or within our waters.

And there never was any disposition to enact such a provision. When our neutrality laws were first proposed, it was suggested that the sale of prizes in our ports should be forbidden, but even this proposition was rejected. Fenwick on the Neutrality Laws of the United States, ch. II, page 26, says:

"In the debates before the House of Representatives preceding the adoption of the act, the discussion was mainly confined to the advisability of adopting a provision forbidding the sale within the United States of vessels or goods captured from a prince or State with whom the United States was at peace, when the vessel or goods had been captured by the enemies of such prince or State, unless the vessel or goods should first have been carried to a port or place within the territory of the State to which the captors belonged. The question was whether the Treaty of 1778 with France restrained the United States from forbidding the sale within its ports of prizes captured by France, and if not, whether it was expedient to refuse France the privilege of selling her prizes in American ports. But in spite of the urgent pleas made in favor of the provision, it was ultimately rejected. The act which finally passed embodied the instructions issued by Hamilton to the collectors of customs, and supplemented them in accordance with the recommendations contained in the President's message."

The instructions of Hamilton (1 Am. St. Papers, 140) specifically referred to prizes brought or sent into our ports. No suggestion was made that a prize legally captured should be prohibited from entry into our ports.

## XII.

THE NEUTRALITY PROCLAMATIONS OF THE UNITED STATES ARE IN ACCORD WITH ITS MUNICIPAL LAW AND WITH GENERAL INTERNATIONAL LAW. HAVING FAILED TO INTERDICT THE ENTRANCE OF PRIZES INTO OUR PORTS, PERMISSION TO ENTER MUST BE ASSUMED.

At the commencement of this war, the President, in accordance with international custom, issued a neutrality proclamation. From time to time, as additional nations entered the conflict, further neutrality proclamations were made. They all forbid belligerent acts within our waters, or on our territory, or the equipment of naval vessels within our country. They are all silent concerning the bringing or sending of prizes within our ports.

This is in line with our traditional policy as disclosed by an examination of our various neutrality proclamations made from time to time throughout our history. Search the neutral proclamations of our Government from beginning to end, and not one word will be found relating to the forbidding of asylum to prizes.

This is not the general European custom. At the commencement of the Civil War, England forbade the entrance of prizes into her ports. France, Belgium, Spain, the Netherlands, and Portugal did likewise. Prussia did not forbid us this right, which appellants contend is permitted to either country in time of war.

Montague Bernard's "The Neutrality of Great Britain During the American Civil War" (London, 870), pp. 145 *et seq.*

Obviously the countries which have notified the belligerents that prizes will be denied entry, are in an entirely different position from that of the United States. During our

history, having consistently kept silent on this subject in our neutrality proclamations, having permitted prizes to come into our ports, and after having for over the first half century of our existence contended for a contrary rule (Bergen Prize Cases), we cannot now say to any belligerent after its prize has entered our port, relying upon what was deemed our proffered hospitality, that it is forbidden a privilege never before denied, either expressly or impliedly. No contention has been made that any notice was ever given of our intention to forbid the entrance of prizes.

It has consistently been held, that in the absence of express prohibition, prizes may enter and remain in neutral ports.

Attorney General Cushing, in his opinion on the *Sitka* (7 Op. Att'y Gen., 122), said, referring to the status of prizes:

"But a neutral power may be so confident in its own strength, or so remote from the immediate scene of war, as not to have conceived it necessary to issue any regulation on the subject of belligerent asylum. In that case, the right of asylum is presumed; for it would be unjust for the neutral State to reject it without previous notification to the belligerent States (Vattel I, iii, ch. 7, sec. 132; Wheaton, p. 478), and such at the present time is the relation of the United States to this question."

This was in line with a dispatch from Mr. Wheaton to the Secretary of State dated November 10, 1843. Mr. Wheaton said:

"If, then, there was no express prohibition in this case \* \* \* the American cruisers had an unquestionable right to send their prizes into Danish ports."

7 Moore's Dig., p. 982.

Montague Bernard, in his work on "The Neutrality of Great Britain During the American Civil War" (pp. 133 *et seq.*), discusses neutrality proclamations. He said:



"Regulations of this kind are not governed by any general law. They are entirely discretionary. A neutral government may admit into its ports or exclude from them (unless in case of stress of weather) both the public ships and privateers of the belligerent powers, or may admit the former and exclude the latter. It may suffer prizes to be brought in and sold, or to be brought in but not sold, or not to be brought in at all. In laying down these rules the neutral regards his own convenience, and is guided by his own judgment; and, so long as they are applied indifferently to both belligerents, neither has a right to complain of them on the ground that they are practically more disadvantageous to himself than to his enemy."

Sir Travers Twiss, lecturer on maritime law at Oxford University, in his "Law of Nations," 2nd edition, Vol. II, pp. 453, 454, said:

"The following propositions contain the views of the Government of the United States of America as to the privilege of Asylum within Neutral Waters.  
\* \* \* 3. When the Neutral State has not signified its determination to refuse the privilege of Asylum to Belligerent ships of war, privateers, or their prizes, either Belligerent has a right to assume its existence, and enter upon its enjoyment, subject to such regulations as the Neutral State may please to prescribe for its own security. \* \* \* 5. A foreign ship of war, or any prize of hers, in command of a public officer, possesses in the ports of the United States the right of extra-territoriality, and is not subject to the local jurisdiction."

W. E. Hall, another English authority, in his work on "International Law," 5th ed., at page 618, said:

"Although the neutral may permit or forbid the entry of prizes, as he thinks best, the belligerent is held, until express prohibition to have the privilege not only of placing his prizes within the security of a

neutral harbour, but of keeping them there while the suit for their condemnation is being prosecuted in the appropriate court."

Other authorities on international law have made similar statements.

Halleck on Intern. Law, 1st ed., p. 523.

Calvo: *Le Droit International Theorique et Pratique*, 3rd ed. (1880), vol. III, p. 498.

In the *Exchange*, 7 Cranch., 116, 1. c. 145, Marshall, Ch. J., said:

"If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place."

### XIII.

THE QUESTIONS AT ISSUE ARE NOT AFFECTED BY THE PROVISIONS OF THE HAGUE CONVENTION.

Counsel for libellant lay great stress upon the provisions of The Hague Convention XIII of 1907, as declaratory of the existing law of nations.

The articles of the convention applying solely to prizes are as follows:

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

"Article 22. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

"Article 23. A neutral power *may* allow prizes to enter its ports and roadsteads, whether *under convoy or not*, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

Scott's Hague Peace Conferences, vol. II, p. 517.

The Hague conventions as conventions are enactments of law, like statutes. What is enacted by them, as in the case of a statute, may have been the law before, or it may be the establishment of a new rule of conduct. And so what was proposed for enactment and rejected may be the existing law or it may be a new rule. The rejection may have been because of the form in which the rule, whether a new one or an existing one, was expressed. The conventions as such are not operative unless all the conditions prescribed, to their being so, have been complied with. Whether in any case of adoption or rejection they are declaratory of existing law is not proven by the conventions, but is determinable from the previous history and literature of the law.

It will be found that some articles may be considered as declarations of international law, others as modifications, and others again as entirely new to the law which governs the intercourse between States. Doctor James Brown Scott says in the introduction to "The Texts of the Peace Conferences at the Hague, 1899 and 1907:"

"The work of the conference concerned the modification of existing international law; international differences of opinion and interpretation were adjusted; doubt gave place to certainty; and, after much consideration and reflection, principles of in-

ternational law were fortified, modified in part, or wholly discarded. A complete code was not established—it is doubtful whether custom and usage are ripe for codification—but important topics of international law were given the symmetry and precision of a code." (Introduction, pp. IX-X.)

Then again he says:

"The work of the Second Conference, for which the year 1907 will be remarkable, was twofold. First, it revised and enlarged the conventions of 1899 in the light of experience, in the light of practice as well as of theory, and put them forth to the world in a new and modified form." (Introduction, p. XIX.)

It may be said that the thirteenth convention of the Conference of 1907 is made up largely of articles which were not recognized as existing principles of the law of nations. It is true that certain articles of this convention place restrictions on prizes of belligerents coming into neutral harbors. It was clearly within the cognizance of the delegates of the conference that these provisions were innovations as regards the existing law.

The preamble to Convention XIII specifically defines its nature and the reason for its formulation as follows:

"With a view to harmonizing the divergent views which, in the event of naval war, are still held on the relations between neutral powers and belligerent powers, and to anticipating the difficulties to which such divergence of views might give rise;

"Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;

"Seeing that, in cases not covered by the present convention, it is expedient to take into consideration the general principles of the law of nations;

"Seeing that it is desirable that the powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them;

"Seeing that it is, for neutral powers, an admitted duty to apply these rules impartially to the several belligerents;

"Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral power, except in a case where experience has shown the necessity for such change for the protection of the rights of that power;

"Have agreed to observe the following common rules, which cannot, however, modify provisions laid down in existing general treaties" (Scott's Hague Peace Conferences, vol. II, p. 507).

If the content of the Thirteenth Convention was intended or understood to be a codification or declaratory of international law it is inconceivable that a body of jurists and scholars should have failed to so define its nature and purpose. It was obviously recommendatory of desirable rules, not declaratory of existing law. In fact because of the absence of generally accepted laws governing the subject of naval war the framers of Convention Thirteen explain that

"With a view to harmonizing divergent views \* \* \* still held on the relations between neutral powers and belligerent powers," etc.

And

"Even if it is not possible at present to concert measures \* \* \* it is \* \* \* undeniably advantageous to frame \* \* \* rules of general application \* \* \*," etc.

But they further explain that, after framing rules to harmonize "divergent views," "in cases not covered by the present convention it is expedient to take into consideration the general principles of the laws of nations." The framers proposed to harmonize rules upon which "divergent views" were held. Other rules "not covered by the present con-



vention" upon which the nations were in accord were not codified, but were left in the body of "the general principles of the law of nations." If this convention was intended simply to codify or declare and not amend existing international law why did it not so state instead of using the terms "concert measures" and "frame rules." Like the men who drafted the Constitution of the United States the members of the Hague Conference were accurate thinkers who used words expressing what was meant. .

The convention provides that the rules adopted "cannot, however, modify provisions laid down in existing general treaties." It is not denied that by the treaty of 1785 as revived in 1828, a prize made by Germany might be brought into our ports under convoy of a man-of-war. Articles 21 and 22 did not modify this treaty provision and so could not affect a prize convoyed into our port. The distinction between a prize so brought in and one coming in under a prize crew is one without a difference, and certainly was not in the minds of our representatives at the Hague or considered by the Senate when the convention was up for ratification.

In addition each adhering neutral nation is constituted the judge as to whether conditions existing during a war justify the alteration of the rules:

"These rules should not, in principle, be altered, in the course of the war, by a neutral power except in a case where experience has shown the necessity of such a change for the protection of the rights of that power" (Scott's Hague Peace Conference, vol. II, p. 507).

One nation could not by its own action and for its own advantage change the existing law. So far as the convention expressed existing law, no ratification was necessary to establish it and rejection could not overthrow it. As a convention; however, it was necessary for all belligerents to ratify it. Otherwise, by its own terms it had no force as a convention, for it is expressly stipulated that "the provisions of the

present convention do not apply except to the contracting powers and then only if all the belligerents are parties to the convention" (Article 28, Scott's Hague Peace Conferences, vol. II, p. 519).

With the advice and consent of the Senate the President ratified Convention Thirteen, excepting Article 23, with all its conditions, restrictions, and reservations. It was ratified with the reservation, that Article XIX of the general treaties with Prussia of 1785 and 1799, revived in Article XII of the existing general treaty with Prussia of 1828, should not be modified thereby. It was ratified upon the condition that the contracting powers shall not be bound by its terms unless all belligerents are parties to the convention. In the present war there are two belligerents, Great Britain and Turkey, which have not ratified the convention. By its own terms, therefore, it does not apply. Great Britain cannot refuse to assume the obligations required to put the convention into effect and yet invoke the provisions of the convention to bind the United States for the benefit of British citizens. In a ruling of the State Department in the case of the *Farn*, it was pointed out to the British Ambassador by Mr. Secretary Lansing that Convention XIII is not binding during the present war.

Mr. Lansing said:

"As to Article 21 of the Hague Convention Number Thirteen of 1907 cited by your excellency as prescribing the treatment to be accorded to the *Farn*, it is only necessary to state that as it appears that His Majesty's Government has not ratified this convention it should not be regarded as of binding effect between Great Britain and the United States." (Dipl. Corr., Department of State, European War, No. 2, p. 140.)

Secretary Lansing would not have committed his government to such a ruling if the article was expressive of existing international law.

It was clear to the Senate and to the President that Convention XIII was in form and substance an international agreement prescribing specifically the conditions upon which it should or should not be binding upon the signatories. A fundamental condition, a *sine qua non*, is that all belligerents shall have ratified it. As two belligerents have failed to ratify the convention its application to the existing war is as effectually nullified as if it had not been ratified by any nation; or even proposed for ratification.

Counsel for libellants assume and argue that the exclusion of prizes from asylum in ports of the United States is in accord with our historic policy, and that the act of ratifying Convention XIII was the recognition and the declaration of established principles of international law. It appears from cases and excerpts cited (in this brief) that this law as interpreted and administered by the courts of the United States, aside from all questions under treaties, denied restitution in cases similar to the one at bar. We affirmatively contended for the principle of sequestration of prizes in the Bergen cases as late as 1843 in Mr. Wheaton's dispatch to Mr. Upshur, Secretary of State. (Moore Int. Law Digest, vol. VII, page 982.)

The established rule of the United States allowing sequestration of prizes has not been changed since that time by constitutional amendment, by act of Congress, by treaty, by executive order, or by judicial decision and adoption thereby, of the rules of international law into the municipal law of the United States. It has always been recognized that a neutral nation had a perfect right to admit or refuse to admit prizes of belligerents into its harbors. If the nation intended to pursue the latter course, a clear indication of such conduct should have been embodied in the Proclamation of Neutrality, issued at the beginning of the war. If no such prohibition was contained in the proclamation, permission to enter was presumed. From the time of the enactment of the Neutrality Laws in 1794 to this date not one of our Presi-

dents has given notice to belligerents in a neutrality proclamation or general form of executive order that the sequestration of prizes in our ports would be forbidden. Even during the present war the President's neutrality proclamations laid no restriction upon the freedom of prizes although they contained detailed rules respecting the stay of warships. President Wilson did not proclaim the Thirteenth Hague Convention as a part of the law of the land restricting the entrance and stay of prizes as President Grant proclaimed Article XIX of our treaty of 1799 with Prussia a part of the law of the land, during the Franco-Prussian war, confirming the right of German prizes to enter and remain in our ports. But later in the *Farn* case the Executive Department of the Government explicitly denied that Convention XIII was a part of the law of the land.

There is nothing to indicate that the rule has been changed by judicial decision or by Executive usage. Principles of prize law and neutrality in maritime war in the past have changed slowly. In the face of the well-recognized principle that silence implies consent to the bringing of prizes into neutral waters a change must be evidenced by some positive act. The fact that some text-writers approve a change by legislation or otherwise does not itself change the law of the United States. Nor does the fact that some States, particularly small powers unable to prevent belligerent aggressions, have, by statute or treaty, adopted the total or partial exclusion of prizes, change the law of the United States. When, if ever, the practice of excluding prizes becomes a duty as well as a right of neutral States (which no authority claims is yet the case), then perhaps one may say that a new rule has been adopted into the law of the United States.

The established American practice, not having been changed in any of the above ways, remains law, and prizes may without interference enter and remain in the waters of the United States pending prize court proceedings abroad.

Not only has the established rule not been changed, but

on the contrary, modern authorities recognize the rule to be as effective as it was a hundred years ago.

Having in mind the ruling of Attorney General Cushing made in the case of the *Sitka*, cited above, an eminent English authority, Sir Travers Twiss, in his *Law of Nations*, 2nd edition, vol. 2, pp. 453-454, said:

"The following propositions contain the views of the Government of the United States of America as to the privilege of Asylum within Neutral Waters. They were issued in 1855 and accord with the practice of European powers. \* \* \* 3. When the Neutral State has not signified its determination to refuse the privilege of Asylum to Belligerent ships of war, privateers, or their prizes, either Belligerent has a right to assume its existence, and enter upon its enjoyment, subject to such regulations as the Neutral State may please to prescribe for its own security. \* \* \* 5. A foreign ship of war, or any prize of hers, in command of a public officer, possesses in the ports of the United States the right of extra-territoriality, and is not subject to the local jurisdiction."

And Wheaton, in his *International Law*, Fifth Eng. Ed., published in 1916, p. 695, says:

"According to the customary law of nations a neutral State was permitted, though not obliged, to admit the prizes taken by belligerents into its ports, and keep them there until they were condemned and sold."

Hautefeuille, the distinguished French authority, says in his "*Nations Neutres*" (Paris, 1868), volume I, pp. 351-2:

"Almost all nations require their vessels to send prizes, into the ports of their own jurisdiction when convenience can be subserved or when conditions will permit. *Not only a storm, pursuit by the enemy, or any other peril, but also the fear, even if not immediate, of these obstacles or the mere fact of distance*



*from the shores of the home country* are sufficient to authorize the entrance of a prize into a foreign port."

Halleck, *International Law*, 1st ed., p. 523, says:

"But while the neutral State may, by proclamation or otherwise, prohibit belligerent vessels with prizes or prisoners of war from entering its ports, the absence of any such prohibition implies the right to enter for the purposes indicated, and any vessel so entering neutral waters, retains her right of extra-territoriality, both with respect to her prisoners of war and her prizes. The question was raised in the port of San Francisco, California, in the case of the Russian vessel, the 'Sitka,' a prize of the British Navy, during the Crimean War."

Calvo, in his work entitled *Le Droit International Theorique et Pratique*, 3rd ed. (1880), vol. III, p. 498, says:

"When, furthermore, in the full exercise of its sovereignty a State refuses asylum in its ports to belligerent vessels, it should do it in formal and explicit terms; otherwise the general principle of extra-territoriality and free admission applied in all its vigor, and consequently these vessels can no longer be prevented from exercising the right of bringing prizes or prisoners of war in, as was recognized in 1855 by the capture of the vessel *Lilka* by the English squadron in the Baltic."

Upton, in his *Maritime Warfare and Prizes*, p. 234, says:

"Formerly captors were not allowed to carry their prizes into neutral ports; now, however, the custom and practice of nations is altogether otherwise, and it is the invariable opinion, even of such as are most jealous of neutral rights and privileges, that a neutral State has no power to interfere with prizes brought into her ports, with the exception specified (*i. e.*, breach of neutrality)."

Libellants argue that the *Appam* violated the neutrality of the United States and the laws of nations when she entered our port. Taking Convention XIII literally a prize was not denied permission to enter a port and no penalty could accrue until after notice to depart was given. After notice to depart is given by the neutral government, under Article 21, and the vessel fails to obey the order, then, and only then, is the power of restitution authorized to be put into operation. Count Dohna, relying upon the right of asylum which he believed to be guaranteed by the treaty and our historical policy of permitting the sequestration of prizes, as indicated throughout our long controversy with Denmark over the Bergen prize cases, and the consistent silence of our neutrality proclamations concerning any denial of the right of prizes to enter our ports, sent the *Appam* into Hampton Roads. The *Appam* was not forbidden to enter, has never been ordered to depart and has not violated American neutrality.

On the other hand, our Government has held in the *Farn* case, that Convention XIII was not in force in the present war, and in the case of the *Appam* herself that it could not accept the British "suggestion that the presence of the *Appam* in American waters in the circumstances constituted a violation of the neutrality of the United States."

#### XIV.

#### In Conclusion.

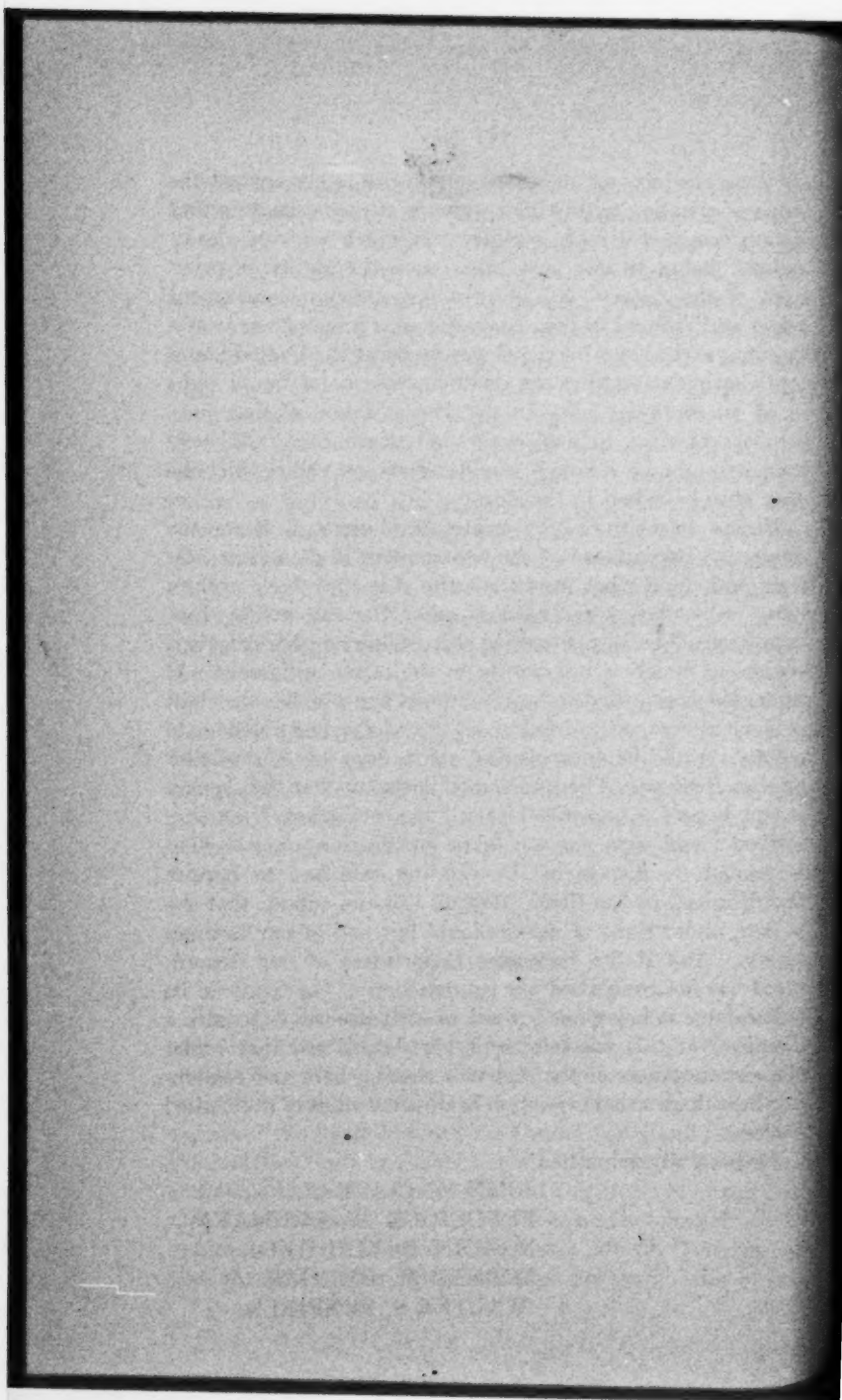
The *Appam*, when she came to the line of our dominion, was a German ship, the property of the German Government. She crossed the line and came into our harbor in the faith that, under principles of international law and the provisions of the treaty between the United States and Germany, she had the right to shelter there. Her coming in did not and could not change her quality as the property of the German Government. Nor was her coming in a breach of the neutrality of the United States. No act of Congress, no proclamation of the President, from the beginning of our

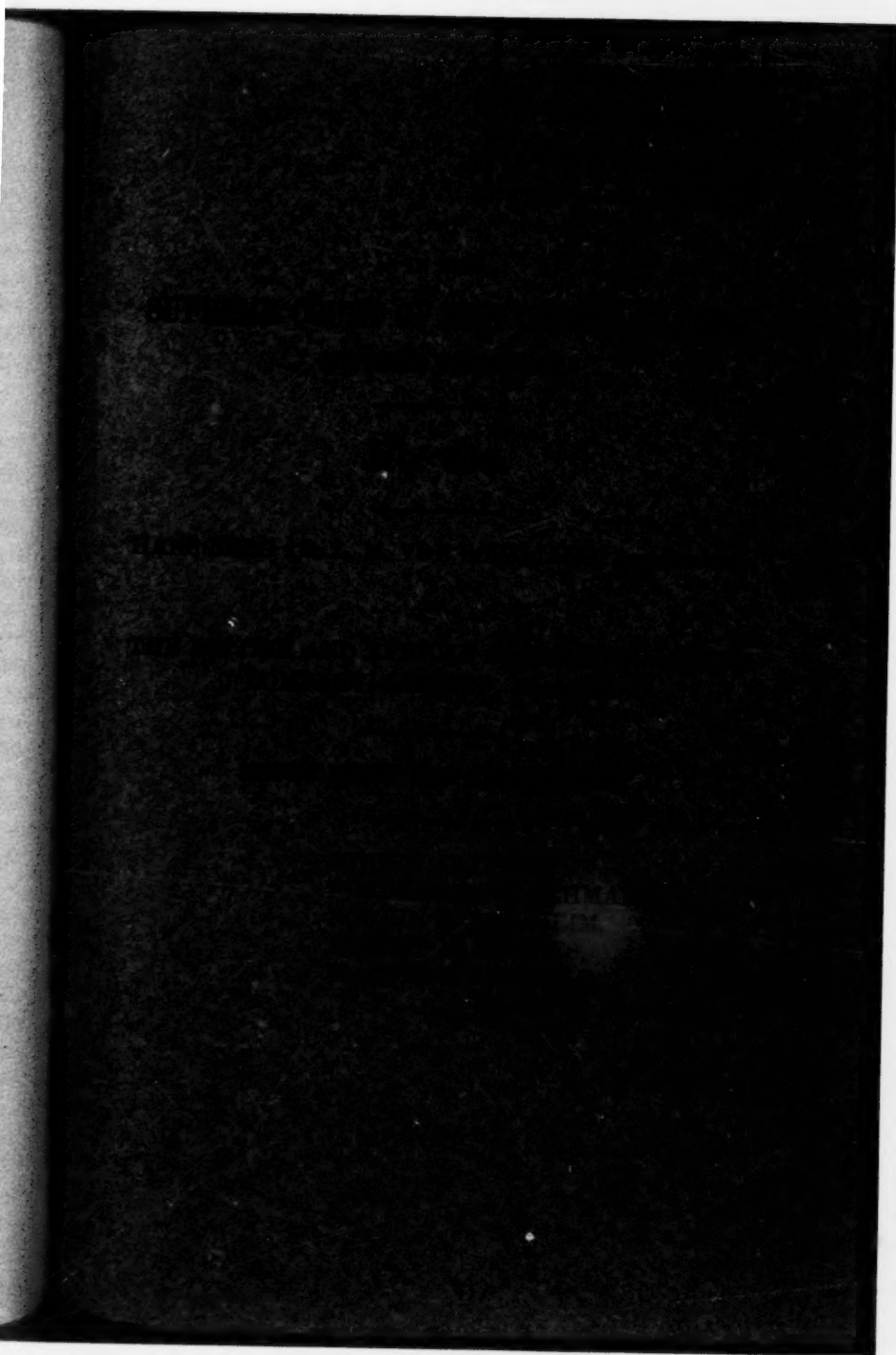
Government has ever closed our ports absolutely against the ships of a nation with which we were at peace, because that nation was at war with another with which we were also at peace. Being in our port, what were the rights or privileges of the *Appam* as a ship of the German Government taken and reduced to firm possession as a prize of war, was a question exclusively for the Government of the United States and Germany, whether the question was one of treaty right or of international law. In the determination of that question the original British owner had no concern, and however it might be decided, would restore no right which he may once have had in the ship.

Except as controlled by treaty stipulations, it is for the Executive Department of the Government to determine how long and upon what conditions the ship may have asylum here. She may be interned as other German public ships have been. She is an unarmed ship, solitary in her category, shelter to which is not hostile to the other belligerent. If under the treaty made a hundred years ago she has the right of shelter here, with freedom to go, as she had freedom to come, it would be an unneutral act to deny her that shelter or that freedom. The undisputed facts are that the *Appam* is not herself a proscribed vessel, was not taken by a proscribed vessel, and was not taken within our waters. That is enough to dispose of the pending case and to require the dismissal of the libel. Beyond this, we submit that she is here under right of international law and of our German treaty. And if the Executive Department of our Government has not recognized our construction of the treaty in its full extent, it has gone beyond what is needed to require a dismissal of this proceeding, it has determined that under the circumstances of the *Appam's* coming here and remaining here there was no violation of the neutrality of the United States.

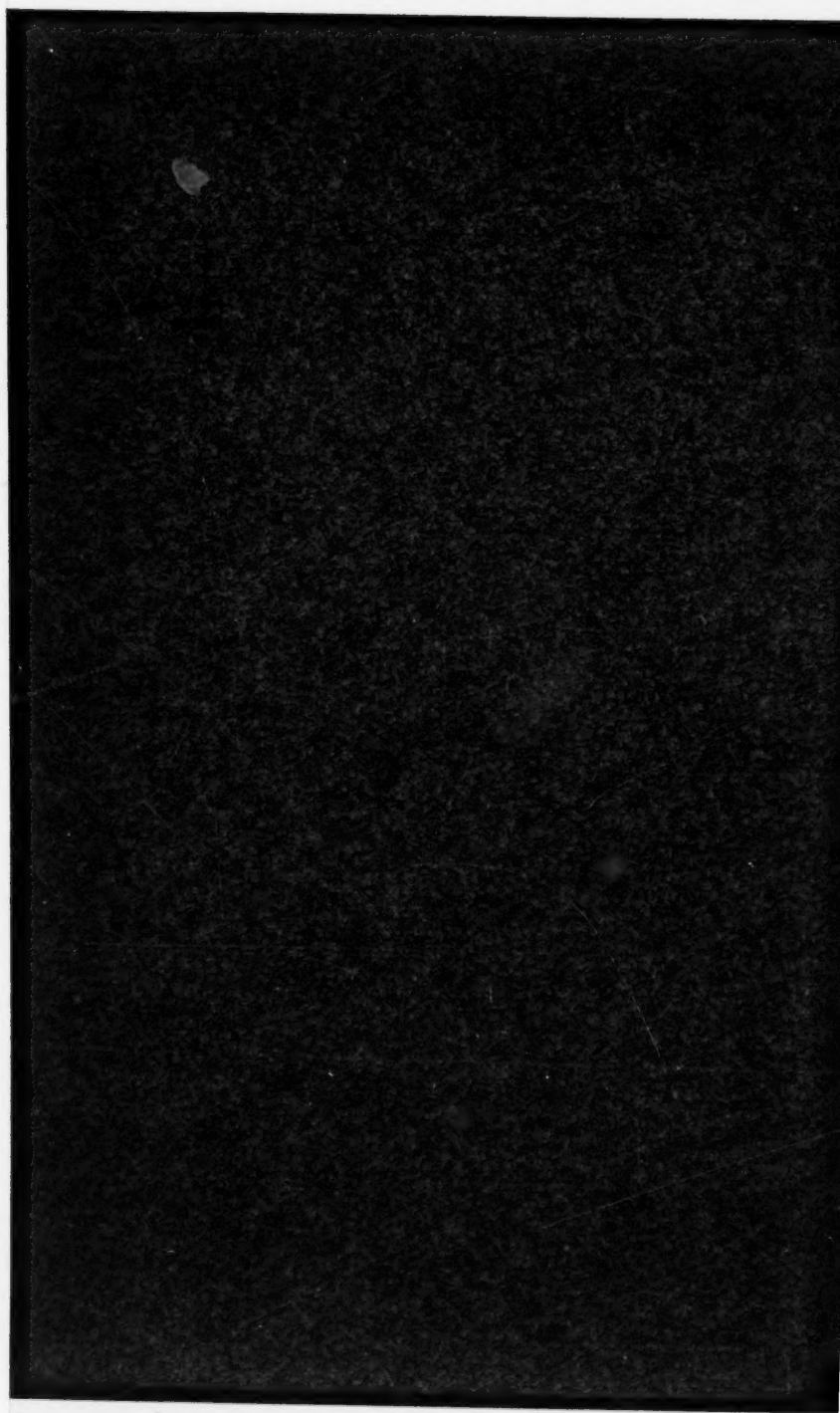
Respectfully submitted.

JOHN W. CLIFTON.  
 FREDERICK W. LEHMANN.  
 NORVIN R. LINDHEIM.  
 ROBERT M. HUGHES.  
 WALTER S. PENFIELD.









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IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1916.

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**No. 650.**

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HANS BERG AND L. M. VON SCHILLING, APPELLANTS,

vs.

THE BRITISH AND AFRICAN STEAM NAVIGATION  
COMPANY, LIMITED, APPELLEE.

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**REPLY BRIEF FOR APPELLANTS.**

---

The brief for the appellees dismisses as undisputed propositions, several questions argued in appellants' main brief. They concede the validity of the capture; the authority of Count zu Dohna and Lieutenant Berg; the proposition that jurisdiction of prize cases is vested exclusively in the courts of the captor government; and "that the mere entry of a prize into neutral waters is not necessarily a breach of neutrality". (Brief for appellees, page 8.)

While the appellees have not expressly admitted the validity of points 11 and 12 of our main brief, they have not discussed them or offered any authorities even tending, in their

opinion, to the contrary. These two propositions are as follows:

"The municipal law of the United States is in accord with international law, as it has been declared by this court"; and "the neutrality proclamations of the United States are in accord with the municipal law and with general international law, and having failed to interdict entrance of prizes into our ports, permission to enter must be assumed."

The argument of the appellees is ingenious. They dismiss the treaty question by assuming the correctness of their own construction. They fail to join issue upon the construction of the English text by calling attention to the French text, which, as we shall later endeavor to demonstrate, just as clearly sustains the contention of the appellants.

The appellees eliminate the historical review of the negotiations leading up to the treaty by simply assuming that the United States got less than it wanted, one of the very questions which are at issue in this case. They finally admit, on page 8 of their brief, "that the question here is simply whether there should be restitution for a violation of neutrality *subsequent* to the actual capture."

There are two main questions in this case, the one whether the provisions of the treaties between Germany and the United States govern the facts under discussion, and secondly, whether the courts of this neutral country can interfere between belligerents, and restore a British vessel, legally captured on the high seas by a German cruiser, to the British owners.

The appellees first attempt to establish certain points, namely:

- (1) that prizes have no right to enter the ports of a neutral nation;
- (2) that the provisions of Convention XIII, of the Hague Conference of 1907, are declaratory of the existing law of nations;

(3) that the history of the United States indicates that the policy of the United States has been against the entrance of prizes;

(4) that a legal capture of a belligerent vessel does not vest complete title in the captor country;

(5) that the "*Appam*" is not entitled to the immunity which a friendly sovereign has in the courts of another country; and

(6) that the captors have abandoned the "*Appam*."

From these six premises, all of which we dispute and shall later analyze, they draw the conclusion which, to our mind, is a perfect *non sequitur*, that the courts of this country should restore the "*Appam*" to its former British owners.

But in order to sustain a claim for restitution, the appellees must find a breach of neutrality. What is the breach of neutrality claimed by the appellees, and where and when did it have its inception?

The "*Appam*" was captured on the 15th day of January, 1916, on the high seas, off the coast of Africa. On the 18th day of January she commenced her westward voyage. On the 1st day of February she entered Hampton Roads. On the 16th day of February, the libel was filed by the appellees.

Now this alleged breach of neutrality must have commenced some time during this period, for the appellees concede that the presence of the "*Appam*" in Hampton Roads, after the libel was filed and while she was in the custody and under the care and protection of our federal courts, could not constitute a breach of neutrality.

"The *Appam* was then held under process of the United States Court, and her mere presence in American waters was, therefore, legitimate." (Brief for appellees, page 74.)

Surely the physical entry of the "*Appam*" into American waters was not a breach of neutrality, for, irrespective of the cause, she was then short of fuel, provisions and supplies, and with a large crew and hundreds of passengers, was certainly entitled to enter a port of a neutral country to replenish her stores. (Record, pages 32, 36, 40, 41.)

The appellees do not vigorously contend that the breach of neutrality occurred during the period from February 1st to February 16th. During that period in which the vessel remained in Hampton Roads, she was not only not "expressly excluded", but was not even asked to depart. Had the "*Appam*" attempted to leave Hampton Roads during this period, the first to complain would undoubtedly have been the appellees.

On that proposition there is already a ruling of the Secretary of State. This question was squarely put up to our State Department by the British Ambassador, in his note of March 31, 1916, and the ruling was received in the note of the Secretary of State, dated April 4, 1916. These two notes are cited in full on pages 94 and 95 of our main brief. The British Ambassador, in his note of March 31st, stated that the "*Appam*" had remained in an American port

"for more than two weeks before suit was instituted,  
\* \* \* The detention of the vessel for *such* a period of time was, therefore, a violation of the neutrality of the United States."

The Secretary of State, in reply, ruled that

"as the vessel was in American jurisdiction at and until the time of the filing of the suit against her, pending the consideration of the question as to whether she was entitled to the privileges claimed for her by the German Government, by virtue of Article 19 of the treaty of 1799, and as this government reached a decision on this question only after the libel had been filed, I am unable to accept your sug-

gestion that the presence of the "*Appam*" in American waters, in the circumstances, constituted a violation of the neutrality of the United States."

The soundness of the ruling of the Department of State is apparent. There could not be a trespass while the alleged trespasser remains upon the premises with the consent of the owner, while his right to remain is being seriously discussed between them.

The appellees, on pages 74 and 75 of their brief, attempt to avoid this ruling of the Secretary of State by intimating that at most, the Secretary of State was merely of the opinion that the presence of the "*Appam*" in American waters did not constitute a violation of neutrality, and then attempt to argue that what the Secretary of State referred to was the presence of the "*Appam*" after the libel was filed and after she was in the custody of the United States courts. On the contrary, the answer of the Secretary of State was specifically addressed to the period from February 1st to February 16th, namely, the period prior to the filing of the libel.

The note of Secretary Lansing is a ruling upon the claim of the British Ambassador that

"the *Appam* had violated the neutrality of the United States by her staying in port up to the beginning of the suit now pending against her."

Consequently, the appellees are driven to the position that the breach of neutrality, upon which they found their claim for restitution, was a breach which occurred before the "*Appam*" entered the waters of the United States. This position of the appellees is apparent in reading their recapitulation and summary on page 105 of their brief. The violation of neutrality there stated was not the act itself, but the attempt to commit the act. Their position is made still clearer on page 74 of their brief, where they state, referring to the "*Appam*":



"It was not her mere presence in American waters, but her attempted use of them, not for temporary refuge, but for permanent safe-keeping, which constituted the violation of neutrality."

On page 80 of their brief they state:

"There was a manifest intention to violate our neutrality from the time she headed westward. The whole proceeding was as described by the court below, 'one continuous occurrence.' The violation was complete as soon as she entered our territorial waters."

Consequently, the position of the appellees is that the breach of neutrality was a continuous one from January 18th, when she headed westward, to February 1st, when she entered our waters.

Such breach of neutrality was a state of mind. It was not a definite act. It was a psychological and not a military operation. Truly a novel doctrine in the law of neutrality.

Our adversaries admit, in point 1 of their brief:

"Unless expressly excluded, prizes may seek temporary shelter in a neutral port, but not permanent or indefinite asylum."

They argue that the breach of neutrality must be adduced from the commission of Count zu Dohna to Lieut. Berg. If on February 1st, when the "*Appam*" entered Hampton Roads, Lieut. Berg had determined, before he crossed the line, for military or other reasons, to leave Hampton Roads after a short stay, there could be no question of a breach of neutrality. Instructions from a military commander to his subordinate have never before, in our opinion, been given an irrevocable effect. But still this is the position of the appellees. On the 2d day of February, 1916, the German Ambassador, the official representative of the owner of the "*Appam*", gave notice to the Department of State that the "*Appam*" intended "to stay in an American port until fur-

ther notice." (Dipl. Corr. of Dept. of State, European War, No. 3, page 331.)

The breach of neutrality, as the appellees see it, was an operation of the mind of Count zu Dohna expressed in the instructions to Lieutenant Berg, on the 18th day of January, 1916, on the high seas, off the African coast, and this they claim was a breach of neutrality of a neutral nation thousands of miles away. Neutrality is a neutral duty and a breach of such duty, on the part of a neutral nation, can not be founded upon the assumed intention of a belligerent.

Dr. James Brown Scott, in his work entitled "The Hague Peace Conferences of 1899 and 1907," published by the Johns Hopkins Press, in Volume 1, at page 630, says:

"It follows, therefore, that the access of the belligerent is not in itself forbidden; it is the act done after entering neutral jurisdiction that condemns the belligerent and forces the neutral to action, \* \* \*

"Therefore, a rule which would exclude the belligerent wholly from neutral waters or ports would seem to be not only inadvisable but harsh, as it is not the presence but the unlawful conduct of the belligerent within neutral jurisdiction which can be of interest to the other belligerent and neutral powers generally."

Compare the "*Appam*" to the status of a guest who had misunderstood his invitation or misconstrued a specific written invitation, (the treaty) and his host's expressed declaration and general invitation, (the history of the United States, as shown in the Bergen prizes) to pay an indefinite visit. Such a guest could not be considered a trespasser if he changed his mind when he found his presence unwelcome. Nor would he be a trespasser if his host permitted him to remain while they were discussing his legal claim to stay on the premises. Nor could he be considered a trespasser if his host formally conceded and admitted the right of his guest to remain for the entire period preceding the institution of the suit. (Ruling of Secretary Lansing, April 4, 1916.)

Either the appellees cannot or will not see a distinction

between illegal capture and legal capture—between no title and full title. The brief of the appellees is replete with authorities which specifically relate solely to illegal capture or to the inadvisability of permitting the sale of prizes in neutral ports before condemnation. The appellees refuse to comprehend, in their brief, the sole causes for restitution decreed by our courts. The question is not one of vague distinction, but of substance. There can be no restitution because there has been, as the appellees claim, some vague breach of neutrality not connected with the capture itself, because restitution does not follow from such an act. Restitution has been decreed and can only be decreed if the capture itself was illegal and if, consequently, no title passed which could be recognized in the courts of this country.

#### POINT I.

##### *The Treaty.*

The appellees, at page 71 of their brief, state that all of the treaties were in French and refer to the French text and the English translation. This is not correct. The treaties with Prussia of 1785, 1799 and 1828, were in both the French and English languages and both texts were signed; this can be clearly seen by an examination of the original treaties in the archives of the State Department.

The appellees argue that the treaties apply only to prizes which are brought into American ports by vessels of war, and that this is manifest from an examination of the texts.

The appellees state that the meaning of the English words is unimportant because of the plain construction of the French text. But the French text is just as clear as the English text, for in the French text the verb "conduire" is used,—"*pourront conduire en toute liberté.*"

The appellees, on page 72 of their brief, refer to this word as follows: "'Conduire' from 'conduco'—to lead with."

This is not the significance of this word in the French language.

Larousse, in his *Grand Dictionnaire Universel*, defines *conduire* as "faire arriver à un bout, diriger, guider, régler;" namely, "to cause to arrive at a destination, to direct, to guide, to regulate."

An investigation of French books, and especially French works relating to maritime and naval matters, shows that in the French language a definite word signifies "convoy", namely, the word "escorter", while the word "conduire" is repeatedly used to signify the control of the prize crew. In many instances both words are used by the same writer in their different meanings.

The nations of the world have, themselves, agreed upon the difference in meaning of the French words "conduire" and "escorter", for both words appear in Article 23 of the 13th Hague Convention, about which there has been so much argument in this case. The first paragraph of Article 23, in the original French text, reads as follows:

"Une Puissance neutre peut permettre l'accès de ses ports et rades aux prises *escortées* ou non, lorsqu'elles y sont amenées pour être laissées sous séquestre en attendant la décision du tribunal de prises. Elle peut faire *conduire* la prise dans un autre de ses ports."

The official English text of this is as follows:

"A neutral power may allow prizes to enter its ports and roadsteads, whether under *convoy* or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize *taken* to another of its ports.

Scott's Hague Peace Conference, 1899-1907,  
Vol. 2, pp. 516-17.

In the instruction to the French Navy of 1870, Article 15 reads as follows:

"Si le capteur n' *escorte* pas sa prise, parce qu'il juge pouvoir l' *expedier* directement, le *conducteur* de la prise doit, a son arrivée au port de destination ou de relache \* \* \*."

The translation of this is:

"If the captor does not *convoy* (*escorter*) his prize because he thinks he is in a position to send it in directly the master (*conducteur-conduite*) of the prize shall, upon his arrival at the port of destination or port of call \* \* \*."

Bonfils, in his *Droit Int. Public*, 3rd edition, 1901, states, paragraph 2:

"Droits et devoirs du capteur. 5° \* \* \* mettre à bord *un équipage pour la conduite de la prise.*" (p. 757.)

The translation of this is:

"Rights and duties of the captor \* \* \* 5—to place on board a *prize crew to conduct* the prize."

In paragraph 1409 he says:

"En principe, le capteur doit *escorter* lui-meme sa prise; mais il peut juger preferable de l'*expedier* sous les ordres d'un officier, qu'il prepose à commandement."

The translation of this is:

"In principle, the captor should himself *convoy* his prize, but he may think it preferable to send it in under the orders of an officer whom he places in command."

In paragraph 1410 he says:

- "Si la prise *escortée*, ou envoyée sous le commandement d'un chef de prise, gagne un port français, le capteur ou l'officier *conducteur* doit déclarer la prise."



The translation of this is:

If the prize, which is *convoyed* or *sent in* under the command of a prize master, reaches a French port the captor or the prize master should announce the prize."

Dupuis, Droit de la Guerre Maritime, states in paragraph 260:

"Mais l'obligation de conduire la prise à un port de l'état capteur est toujours une gêne, souvent un péril. Le navire qui opère la saisie *escorte-t-il* le bâtiment capture, il lui faut renoncer pour un temps, à poursuivre toute opération de guerre; *detache-t-il* simplement un équipage de prises, il diminue ses forces; \* \* \* La *conduite* de la prise est à tout le moins un embarras." (p. 321).

The translation of this is:

"But the duty to take the prize to a port of the captor's state is always a care, often a peril. If the vessel which has made the capture itself *convoy*s the captured ship, it must renounce for a time its war-like operations; if it simply *detaches* a prize crew, it diminishes its forces. The *sending in* of the prize is, in every instance, an embarrassment."

There seems to be no precedent for any such limitation upon the meaning of the word "conduire" as has been applied by the appellees, and the authorities of the French dictionaries and the French writers on international law, support the proposition that the word "conduire" does not signify convoy, but, on the contrary, the word "escorter" is used in that significance, and that the common natural meaning of the word "conduire" is that for which we contend namely "to send in" under a prize crew.

In the English text of the treaty of 1799 the following occurs:

"Nor shall such prizes be arrested, searched or put under legal process, when they come to the ports of

any party, but may freely be carried out at any time by their captors. \* \* \*"

This is not the exact equivalent of the French text, which reads as follows:

"Ces prises ne pourront etre non plus ni arretées, ni visitées, ni soumises a des porcedures legales, en entrant dans le port de l'autre partie, mais elles pourront en sortir librement, et etre conduites en tout temps par le vaisseau preneur. \* \* \*"

The correct translation of this would be as follows:

"The prizes may not be arrested, searched or put under legal process in entering the port of the other party, but *they (the prizes) may leave such port freely and be conducted at any time by the captor vessel.*"

On page 72 of their brief the appellees attempt to make the French words "le dit vaisseau" refer solely to the captor vessel—"to the places named in the commission which the officer commanding the said vessel (le dit vaisseau) i. e., the captor vessel." The French text uses the word "vaisseaux" to indicate not only the captor vessels, but likewise the captured vessels,—"*les vaisseaux de guerre publics*" in one place, and in another place, "*les vaisseaux et effets qu'ils auront pris sur leurs ennemis.*" This similarity occurs in the English text. The phrase "the commanding officer of such vessel" cannot be construed to mean the vessel of war any more than the captured vessel, for the ships of war and the captured ships are both described in the English text as "*vessels.*"

The appellees dismiss the historical review of the negotiations for the treaty by stating, on page 72 of their brief, that it demonstrates that the United States were "trying to get more than they finally got." On pages 76 and 77 of our main brief we have cited cases and practices substantiating the proposition, that a treaty is to be construed in view of the circumstances and conditions which prompted its adoption, and that when a treaty admits of two constructions, one re-

strictive as to rights and the other liberal, the latter is to be preferred. The proposition of the appellees is to narrow the effect of the treaty to such a point as to nullify any advantage we hoped to get from the treaty. The true object of the treaty was, as we have shown in Point X of our brief, the obtaining of ports on the other side of the Atlantic Ocean into which we could send our prizes, with or without convoy, in order to eliminate the questions which arose in the Bergen Prize Cases, where John Paul Jones sent his prizes into a neutral port in charge of prize crews and without convoy.

In the next sentence, on page 72 of their brief, the appellees state that the American representatives chiefly sought a right of access to Prussian ports for war vessels with prizes. This distinction between convoyed and unconvoyed prizes was one which never occurred to the American representatives, as is most apparent from a reading of the diplomatic correspondence cited under Point X of our main brief. No distinction was then recognized between convoying or not convoying, sending, carrying, bringing or taking prizes into a neutral port.

The third criticism of the appellees on page 72, is a gratuitous injection by the appellees of their conclusion in 1917, concerning the unexpressed intention of Frederick the Great in 1778. Frederick did raise a question concerning his ability to protect our prizes, but Adams, Franklin and Jefferson were persistent, and just prior to the signing of the treaty wrote their joint letter to Frederick's Minister (cited on page 87 of our brief) in which they discussed not only the general right of carrying prizes into neutral ports, whether convoyed or not convoyed, but even of selling them there, and stated that this was admitted by the usage of nations at that time.

The object of the treaty of 1785, as specifically stated by the Commissioners who signed that treaty on behalf of this country, was to obtain a port or haven for the prizes of this country in Europe and to eliminate, as far as possible, such

geographical advantages as were possessed by the possible enemy of the United States.

The appellees insist that the construction which we state is the only natural construction of the treaty would be incompatible with this Government's neutrality toward the other belligerents. This is not the contention of the appellants. The history of the United States shows the contrary.

In 1793 this very question was discussed between the English Government and our Government. England had complained that under the French treaty the United States was affording rights to France which were not covered by similar treaty obligations with England. In a note dated September 9, 1793, Thomas Jefferson, then our Secretary of State, notified England that irrespective of the treaty, the giving of the right to France also meant that England had the same rights and that her vessels could come into our ports not only when they were in need of provisions and supplies, but "in all cases of weather, pirates, *enemies* or other urgent necessity" and also "on the principle of hospitality between friendly nations—that of going into our ports not under the pressure of urgent necessity, *but whenever their comfort or convenience induced them* and on this ground also the two nations are on a footing." This note is quoted in full on page 63 of our main brief.

## POINT II.

### *The Sequestration of a Prize in a Neutral Port Pending Condemnation.*

The argument of the appellees that the law of nations forbids the sequestration of a prize in a neutral port pending condemnation, is the first premise upon which they seek to find a breach of international law and a breach of neutrality. They state that the rule is the product of a

long course of historical development and they refer, at page 11 of their brief, to the edict of the States General of Holland, of November 7, 1658. This edict is set forth in Bynkershoek, quoted in a note in 5 Wheat., page 349. The very note from which the appellees quote is contra to their position, for it states:

"Although it be lawful, on national principles, to carry a prize into neutral territory, and there to sell it, if the captor thinks proper, laws have, nevertheless more than once been made to the contrary."

Bynkershoek then quotes the edict, and after quoting it comments upon it as follows:

"Whether those edicts were extorted from the States General by fear or by any other cause I do not know; but lest they should hereafter militate against national principles I must declare that I rather believe them to have been temporary than perpetual laws."

This temporary edict extorted by fear is the foundation upon which the appellees base their structure of international law; truly a foundation laid in quicksand.

The appellees then, on pages 12 and 13 of the brief, attempt to show that the British courts laid down the rule announced in their Point I. This is not the fact. It is true that the English courts intimated that they would like this to be the rule, but again and again the English courts stated that since the rule was to the contrary, England was not going to be handicapped by adhering, to its disadvantage, to a doctrine not recognized by the other nations.

The appellees rely upon the case of the *Flad Oyen*, 1 C. Rob., 135; but this case was overruled by the later case of the *Henrick* and *Maria*, 4 C. Rob., 43, also reported in 1 Roscoe Prize Cases, 339.

In that case Sir William Scott, later Lord Stowell, in his opinion, pointed out that the English themselves had



frequently condemned in the British Prize Courts, prizes lying in neutral ports, and held that such condemnation was valid. At the end of his opinion he stated:

"But sitting here and observing as I am judicially bound to do, the course of judicial administration which has prevailed, I do not feel myself authorized to uphold the sentences which have passed in this court over prizes carried into foreign ports, and disallow at the same time the validity of such as the enemy has pronounced."

Upon appeal the opinion was delivered by the Master of the Rolls, Sir William Grant, 6 C. Rob., 138. He stated in his opinion, affirming the decision below permitting the condemnation of prizes lying in neutral ports:

*"This case involves a question as to the validity of sentence of condemnation pronounced in a belligerent country on prizes carried into neutral ports. There was some difference of opinion among the members of the board before which the case was originally argued. But it appeared to me that the acknowledged practice in this country must have the effect of making this sentence valid whilst that practice continued."*

In the *Cosmopolite* No. 1, 3 C. Rob., 333; 1 Roscoe Prize Cases 321, the vessel was captured and carried into a neutral port and condemned by the belligerent court while the prize was lying in the neutral port. The question of the invalidity of this condemnation was raised, but Sir William Scott, held the condemnation valid, and ordered that the claimant who had purchased the vessel in the neutral port, pursuant to the foreign condemnation, should have possession of and title to the vessel.

In Wheaton's History of the Law of Nations, page 321, he states:

"Thus, captures made by British cruisers in the Mediterranean, and brought into the neutral port of

Leghorn had there been adjudicated, either by the Prize Court of Vice Admiralty sitting at Minorca while that island belonged to Great Britain, or by the High Court of Admiralty in England."

The appellees argue that the German Prize Code imposes the duty upon German naval commanders to immediately take their prize into their home port. We cannot so construe paragraph 111 of the German Prize Code. In our opinion this Code provides that under any circumstances a prize may be brought into a neutral port if the neutral power so permits, but that, even in spite of any such permission, a prize may be taken into a neutral port on account of unseaworthiness, stress of weather, lack of fuel or supplies. Unless our construction of this Prize Code is correct, the two sentences contained therein are contradictory.

The appellees state that there is a striking agreement of opinion among the leading text writers on the subject. Our reading of the text writers leads to a conclusion that the striking opinion is contrary to that argued by the appellees.

The appellees cite Wheaton's *Treatise on Capture*. In the Fifth English Edition of Wheaton's *International Law*, at page 695, the following occurs:

"According to the customary law of nations a neutral state was permitted, though not obliged to admit the prizes taken by belligerents into their ports and keep them there until they were condemned and sold."

Wheaton himself, when Minister to Prussia, in his note to Upshur, quoted on page 63 of our main brief, in referring to the Bergen Prize cases, said:

"The American cruisers had an unquestionable right to send their prizes into Danish ports."

In Dana's notes to Wheaton on *International Law*, page 486, the following is stated:

"Whether a prize may or may not be taken into or remain in a neutral port, to await proceedings at home, or for sale by the captors, or for any other purpose, is a question for the neutral sovereign to decide."

Appellees quote Hall on international law, on pages 15 and 16 of their brief, but they fail to quote from Hall that portion on page 618 immediately preceding their quotation. This reads as follows:

"Nevertheless, although the neutral may permit or forbid the entry of prizes as he thinks best, the belligerent is held, until express prohibition, to have the privilege not only of placing his prizes within the security of a neutral harbor, but the keeping them there while the suit for their condemnation is being prosecuted in the appropriate court. *Most writers* think that he is also justified in selling them at the neutral port after condemnation; and, as they then undoubtedly belong to him, it is hard to see on what ground he can be prohibited from dealing with his own."

The appellees were likewise economical in their quotation in respect to Risley on the Law of War, quoted on page 16 of their brief. Immediately preceding the portion quoted by the appellees appears the following, on page 176 of Risley on the Law of War:

"*Under the general rule* a prize may not only be brought into a neutral port but may also be kept there until duly condemned by a Prize Court sitting in the belligerent's own country."

What follows is Risley's own criticism of the rule, but the fact that the general rule is contrary to the proposition of the appellees clearly appears in the authors cited by them as authorities. Many other text writers substantiate the proposition that the general rule of the nations is to permit the entrance of prizes. Quotations to this effect from Upton, Calvo, Halleck, Wheaton, Twiss and Hautefeuille appear on pages 114

and 115 of our main brief. There is a striking unanimity among these writers to the effect that there is no question but that prizes may enter neutral ports, unless there is an express prohibition by the neutral power to the contrary.

Manning in his *Law of Nations*, pages 387 and 388, states:

"I find Loccencius, '(DeJure Maritime,' (1648), I. i. c. iv. s. 7) considering this subject and deciding that prizes in neutral ports could not be interfered with unless special treaty intervened.

"It is the invariable opinion, even of those most jealous of the privileges of neutrals, that a neutral state has no power of interfering with prizes brought to her ports, unless from the operation of special treaty."

Sir Robert Phillimore in his commentary on *International Law*, volume 3, page 577, says:

"Upon the subject of uniformity of permitting prizes to be brought into neutral ports no uniformity of practice has prevailed. The matter has sometimes been governed by (1) domestic regulations, (2) sometimes by treaties. In the absence of such provision the presumption is in favor of the permission."

Halleck, in his work on *International Law*, says:

"The Supreme Court of the United States has followed the English rule and has held valid the condemnation by a belligerent court of prizes carried into a neutral port and remaining there, the practice being justifiable on the grounds of convenience to belligerents, as well as neutrals; and though the prize was in fact within neutral territory, it was still to be deemed under the control, or *sub potestate*, of the captor, whose possession is considered as that of his sovereign. *It may also be remarked that the rule thus established by the highest courts of England and the United States is sanctioned by the practice of France, Spain and Holland.*" (II, 426 and 427.)

But we have still better authorities than the English cases or the opinions of the text writers, for the Supreme Court of the United States has recognized not only the right of a prize to enter a neutral port, but even the right of a belligerent country to condemn a prize while lying in a neutral port.

In the *Santissima Trinidad*, 7 Wheat. 283, Justice Story said:

"Property may be condemned in courts of the captor while lying in a neutral country, (a doctrine which has been affirmed by this court)."

In the *Arabella*, 1 Fed. Cases, No. 501, p. 1077, Mr. Justice Story said:

"The first question which presents itself, is whether the court has jurisdiction to proceed to the adjudication of prize property lying in a foreign neutral port. This question has been discussed with much ability and learning in the courts of Great Britain, and has there been finally settled in the affirmative, not so much on the supposed correctness of the principle, as the general usage of nations. It was then admitted, that condemnation of prize property lying in the ports of an ally in the war was strictly justifiable; but it was thought that a different rule might apply to neutral ports. In the courts of the United States, the question has received a solemn decision, and it has been held that upon principle a condemnation of a prize lying in a neutral port is valid and may be rightfully decreed by the prize jurisdiction."

The appellees cite a number of neutrality proclamations interdicting the entrance of prizes. We have treated this question of neutrality proclamations in Point XII of our main brief, pages 103 to 106. Obviously if countries had forbidden the entrance of prizes they are in quite a different position from that of the United States, which during its entire existence not only has never forbidden the entrance of prizes, but has even contended for the contrary proposition.



## III.

*The Hague Conventions.*

In point 2 of their brief, the appellees contend that Articles 21 and 22 of the 13th Hague Convention, are declaratory of the existing law of nations and that the express refusal of the United States to accede to Article 23 was notice to the world that this nation would reverse its historical position. This point follows point 1 of the appellees' brief, where they sought to find that the general law of nations was in their favor, by relying upon English cases which had been overruled, by quoting a few text-book writers whose own opinion, sometimes immediately preceding the quotations made by the appellees, was directly contrary, and by completely ignoring the opinions of our courts, including the opinion of this Supreme Court.

In the 13th point of our main brief, we argue that the questions at issue are not affected by these provisions of the Hague Convention. We show by quotations from the preamble to this very Hague Convention, that they were expressly not declaratory of international law, but were compromises and innovations.

One of the standard works on the Hague Peace Conferences is that of A. Pearce Higgins. In his introduction to that work, at page XII, he states:

"The results of the various conferences which are set forth in the following pages all tend in one direction. They are attempts for the most part only partially successful and characterized by all the defects inherent to *compromise* wherein the political aspirations of the various states of the world have been sought to be adjusted, to bring into existence a code of rules which shall be universally recognized as binding on belligerents and neutrals failing a peaceful settlement of their quarrels."

As pointed out in our main brief, the Department of State has, in this war, already ruled that these articles of the Hague Convention are not applicable, in view of the failure of the British Government to ratify the Convention. While the Senate of the United States, by resolution, did ratify the Convention, with the elimination of Article 23, it did so pursuant to all of the terms of Convention 13 and ratified it, as pointed out on page 111 of our brief, upon the condition that the contracting powers should not be bound by its terms unless all the belligerents are parties to the Convention. The appellees cannot contend that the action of the Senate of the United States was a notice to all the world. It did not purport to be so in all its terms. It purported to be merely what it was,—a ratification of a definite Convention, subject to all the terms, conditions and limitations contained in that Convention, and these terms, conditions and limitations expressly make this Convention inapplicable to the questions at issue.

If the refusal to ratify an international convention is a notice to the world that the policy of the United States is to the contrary, then the appellees are forced to the position that the refusal of the United States to ratify the Declaration of Paris is a notice to the world that this Government still sanctions privateering and that a blockade need not be effective.

They contend that Articles 21 and 22 are declaratory of international law, but if this be true, why not Article 23? Article 23 is part of the Convention and international law is not nullified simply because the opinion of one or two countries is contrary thereto.

The following nations have signified their adherence to Article 23:

Germany, Argentine Republic, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Columbia, Denmark, Dominican Republic, Ecuador, France, Greece, Guatemala, Haiti, Italy, Luxemburg, Mexico, Montenegro, Norway, Panama, Paraguay, Netherlands, Peru, Persia, Portu-

gal, Roumania, Russia, Salvador, Servia, Sweden, Switzerland, Turkey, Uruguay and Venezuela.

The only nations of the world which have taken definite action against 23 are Great Britain, Japan, Siam and the United States. It will be noted in examining the list of the nations which have adhered to the provisions of 23, that nations on both sides of this unfortunate war are well represented.

The following nations now at war have failed to ratify Articles 21, 22 and 23: Great Britain, Japan, Turkey, Servia, Montenegro, Roumania and Bulgaria.

Article 23 of the 13th Hague Convention of 1907, is, as has been frequently pointed out, contradictory in its terms to Articles 21 and 22. The reason for this is that there was a difference of opinion among the delegates as to what should be the rule concerning the entrance of prizes into neutral harbors, and the fact that this question was bound up with the doctrine of the permissibility or non-permissibility of the destruction of neutral prizes. England and the United States, at the Hague Convention, objected to Article 23 because they were urging the inclusion of a rule forbidding the destruction of neutral prizes. Even those who have objected to Article 23 recognized its soundness if neutral prizes may be destroyed at sea.

This is clearly borne out by Dr. James Brown Scott, in his work on the Hague Peace Conferences of 1899 and 1907. In volume 1, page 645, he states, commenting on Article 23:

"From another point of view, there is, however, much to be said for it. If the belligerent has the right to destroy a neutral prize which cannot be conducted to the home country for adjudication, the privilege of taking the prize into a neutral port and leaving it there pending adjudication is no slight protection to the prize, and may prevent a resort to the harsh method of destruction. Not only is the vessel saved but the evidence upon which the validity of the act depends is secure and the ends of justice are advanced.

"From this point of view the article may prove beneficial but only upon the supposition that the belligerent possesses the right to destroy neutral prize. If he does not possess the right to sink the prize and if it cannot be taken into neutral port the prize would have to be released."

At page 728 he states:

"Article 23 of the convention on the rights and duties of neutrals in naval war may tend to preserve the prize in the absence of any other agreement between the nations."

England and the United States objected to Article 23 in the year 1907. The action of the United States Senate, in excluding Article 23, was by resolution on April 17, 1908. The delegates at the Hague Convention recognized that there was much work still to be done, and one of its recommendations was that a new conference should be held to discuss this very question of the destruction of neutral prizes. Great Britain called the conference at London, which sat in 1909, and this question was then and there discussed, and there was recognized in Article 49 the right to destroy even neutral prizes at sea. The right to destroy belligerent prizes at sea has never been questioned, and during this very war the belligerents on both sides have sunk and interfered with neutral prizes. To-day, therefore, the objection to Article 23 has disappeared and the necessity for its inclusion in the body of international law is emphatic, for even neutral prizes taken by those powers which have no harbors ready at hand, must suffer destruction unless they be accorded the protection vouchsafed by Article 23 of the 13th Hague Convention of 1907.

On page 25 of their brief, the appellees argue that Article 23 was an "innovation," but on page 27 they cite 23 as "the revival of an ancient abuse." On page 25 the appellees state that the German Prize Code makes no mention of the per-

missive innovation contained in Article 23, but an examination of the German Prize Code, as quoted by the appellees on page 13 of their brief, shows that it provides that a prize may always be brought into a neutral port, "if the neutral power permits the bringing in of prizes." They argue at page 26 of their brief that some positive action is necessary, in order to make Article 23 operative, but as pointed out by the authorities in point 12 of our main brief (pages 103 to 106), the reverse of this is true, and positive action must be taken by the neutral country, in order to prevent, not permit the entrance of prizes. They argue on page 26 of their brief that the order to leave, mentioned in Article 21, does not refer to a case like the "*Appam*". After calmly building up their own structure of international law, and after claiming that Articles 21 and 22 declare international law as they concede it, they now wish to modify Article 21. Article 21, by its very terms, states that if the vessel does not leave, "the neutral power must order it to leave at once" and inflicts no penalty unless it should "fail to obey."

It is clear that the questions at issue, if governed at all by the Hague Conventions, and even if, for the sake of argument, Article 23 be eliminated, must come under the provisions of Article 21 rather than Article 22, for the "*Appam*" did enter Hampton Roads short of fuel, provisions and supplies (Record, pages 32, 36, 40 and 41).

While off Hampton Roads, before her entrance, the "*Appam*," with a large crew and hundreds of passengers, was without sufficient supplies, fuel or provisions to go further. The cause of such shortage is immaterial to the neutral country. The "*Appam*," as a prize of war, had a right, as a military operation, or for any other reason, to cruise the high seas and to enter a neutral port when she saw fit to replenish her stores. This is a proposition which we have never known to be contradicted in international law.

The appellees evidently see that the failure to notify the



"*Appam*" to depart has deprived them of their complaint as to a breach of neutrality, and now seek, by ignoring the facts, to apply a different rule.

On page 24 of their brief, they quote Article 14 of the Hague Convention, which refers to a belligerent war-ship and not to a prize, and which article provides for the departure as soon as the cause of the delay is at an end, irrespective of whether notice is given or not. They then state that it is thus evident that no request to depart is necessary. They carefully refrain from limiting such statement on page 24 to Article 14. It seems clear that if those who drafted the Convention refrained from requiring a notice to depart in Article 14, and provided for a notice to depart in Article 21, the inclusion of such notice in Article 21 is substantive and should govern all proceedings under and pursuant to such article.

#### IV.

##### *A History of the United States Neutrality Laws.*

In point 3 of their brief, the appellees argue that the history of the United States neutrality laws and the circumstances attending their origin, indicate the custom of the United States to be against the entry of prizes into American ports. To sustain this position, they cite much in reference to the iniquity of capturing prizes within our neutral waters and of instituting prize courts upon our neutral territory. They cite pages from McMaster on the doings of Citizen Genet. The appellants do not join issue on these questions. But in their history of the neutrality laws of the United States, the appellees carefully refrain from quoting Washington, Hamilton, Jefferson and Monroe, who repeatedly stated that the neutrality laws of the United States were deliberately made to interdict illegal captures and the taking of prizes within our neutral waters or by vessels which were fitted out or whose crews were augmented in our ter-

ritory. There is not one word in the diplomatic correspondence of that time, in the declarations of the statesmen of that time, or in the decisions of the courts of that time, indicating that anyone was of the opinion that a prize did not have the right to enter our ports.

Under this point the appellees consider the case of *Glass et al. vs. the Betsy*, 3 Dallas, 6. The appellants do not criticize this decision. We have stated the law in point 7 as follows:

"The courts of a neutral country, as to a vessel within their jurisdiction, may inquire whether it is held a prize of war or whether her *taking* was a violation of the neutrality of their country."

*Glass vs. The Betsy* stands for this very proposition. The appellees seek to make this case one of jurisdiction to decree restitution where a prize has entered our ports, irrespective of where or by whom she was captured. This is not what the Supreme Court decided. The courts below refused jurisdiction. The Supreme Court stated (L. C. 16):

"The District Court of Maryland aforesaid has jurisdiction competent to *inquire*, and to decide, whether, in the present case, restitution ought to be made to the claimants, or either of them, in whole or in part, (that is, whether such restitution can be made consistently with the law of nations and the treaties and laws of the United States)."

The case went up to the Supreme Court on a plea to the jurisdiction, and was sent back by the Supreme Court to the District Court, to inquire into the facts and decide what should be done with the vessel. This is the contention of the appellants. We do not deny that the federal courts have jurisdiction to ascertain whether this is a lawful prize or a prize so illegally captured that it cannot be recognized in the courts of our country. The sole jurisdiction is one to inquire into the facts and ascertain whether, in accordance

with the law of nations, and the treaties and laws of the United States, restitution can be made.

Professor Moore, quoted on page 42 of the appellees' brief, clearly points out that the case of the sloop "Betsy" merely decides that the courts of the United States have jurisdiction "to intervene in respect of prizes made by cruisers illegally fitted out and armed in the United States." It is interesting to note that the sloop "Betsy" was captured within our territorial waters and by a French privateer, "The Citizen Genet," illegally fitted out in the Port of Charleston. (Bemis on American Neutrality, Note p. 15.)

The appellees cite a letter from Mr. Seward, Secretary of State, to the Peruvian Legation. This letter, cited in Moore's Digest, Vol. 7, page 938, is taken from M. S. Notes to Peru, Feb. 26, 1866. The letter was an answer to and acknowledged the note of the Peruvian Minister of February 23, 1866, "inquiring as to the conduct which during the war between Peru and Spain, which has unhappily been resumed, will be observed by the government of the United States in respect to the vessels of the Peruvian or of the Spanish Navy, and in respect to cruisers of either of the belligerents which may arrive on the coast or in the ports of this country."

The Peruvian Minister asked no question concerning prizes. He received merely a ruling concerning the convoy of a prize by an armed vessel. Outside of this dictum of Mr. Seward, purporting to be an answer to a question which was not asked, there is no ruling sustaining the contention of the appellees. All that the appellees have quoted are statements to the effect that a neutral nation *may* exclude prizes or that the laws of the United States do not permit the sale of prizes within the territorial limits of this country.

But after this letter was sent and on December 9, 1880, Mr. Evarts, Secretary of State, followed the rule of Attorney General Cushing (7 Opin., Att'y Gen., 122), in a note to the

Venezuelan Minister, M. S. Notes to Venezuela I, 210; (partly quoted in 2 Moore's Digest, pages 578-579):

"During the war in which Russia was a party on one side and England, France and other powers on the other questions relating to this subject arose some of which were referred by my predecessor Mr. Wm. L. Marcy to Caleb Cushing, Esquire, then Attorney General. An elaborate opinion of the latter relative to belligerent asylum bears date of the 28th of April 1855. One of its conclusions is that a foreign ship of war or *any prize of hers* in command of a public officer possesses in the ports of the U. S. the rights of extraterritoriality and is not subject to local jurisdiction. This view was repeated in another opinion of Mr. Cushing of the 6th of September 1856 which declared that ships of war enjoy the full rights of extraterritoriality in foreign ports and territorial waters.

"Hoping that this information may be useful to your government I offer to you sincere and renewed assurances of my very high consideration."

Consequently, in 1880, our Department of State still followed the law as laid down by Attorney General Cushing in the *Sitka* case.

On pages 51, 52, 98 and 99 of their brief, the appellees attempt to evade the conclusion of this opinion of Attorney General Cushing, by attempting to limit the opinion merely to the case where a prize was convoyed, but they have failed to note that portion of the opinion in which Cushing stated:

"Any officer bearing the proper commission of his government had as much right to enter the port of San Francisco, in command of the "*Sitka*" as if in command of the "*President*", without it being the right or the duty of the United States to demand explanation as to her last or any previous port of departure."

In other words, it was the opinion of Attorney General Cushing that if the "*Sitka*", a prize, entered the port of the

United States under the command of a commissioned officer, the United States had no more right to question its entrance than the entrance of an officer in command of a convoying man-of-war.

The appellees seek to dismiss the Bergen Prize Cases upon the ground that the general question of the asylum for prizes was not discussed to any extent and that these prizes were brought into Bergen under stress of weather and for necessary repairs. The letter of Benjamin Franklin, to which they refer, at page 53 of their brief, states that two prizes, the "Betsy" and the "Union" had gone into Bergen under stress of weather and for necessary repairs, and because they were "weakly manned."

Wharton, Dipl. Corr. of the Revolution, vol. 3, pages 433, 434.

On page 434, Franklin referred to a third prize, the "Charming Polly", but stated no reason why she entered Bergen outside of the one that she desired a haven for refuge. Throughout the entire diplomatic correspondence referring to the Bergen prizes, the claim of the United States is one of "rights of hospitality which civilized nations extend to each other."

Mr. Wheaton, in fact, in the letter quoted on page 63 of our main brief, insists that "the American cruisers had an unquestionable right to send their prizes into Danish ports," irrespective of any necessity arising from stress of weather.

The position of the United States is likewise made clear in the letter of Mr. Jefferson, Secretary of State, quoted on page 63 of our main brief, in which he claimed the right to send prizes into the ports of a neutral nation "on the principles of hospitality between friendly nations—that of coming into our ports, not under the pressure of urgent necessity, but whenever their comfort or convenience induced them."



## V.

*The Legal Effect of the Capture.*

The appellees argue, in point 6 of their brief, that a legal capture of a belligerent vessel does not vest complete title in the captor country. They have failed to realize the distinction between the capture of a neutral vessel and a belligerent one. As has been pointed out by Dr. James Brown Scott, in Volume 1, page 644, of his work entitled "The Hague Peace Conferences of 1899 and 1907", published by the Johns Hopkins Press:

"Capture of enemy property vests the title immediately in the captor, whereas the title to neutral property is only passed by a decision of a competent prize court. If, therefore, an enemy-prize be sunk at sea, the captor is practically sinking or destroying his own property."

Several of the authorities cited by the appellees under this point emphasize this distinction.

Burlamaqui and Lee, quoted on pages 83 and 84 of the appellees' brief, hold that title passes.

The authorities relied upon by the appellants on this proposition are cited under Point 4 of appellants' main brief, pages 24 to 34.

The case of the "Adventure", referred to by the appellees at pages 86 to 89 of their brief, is discussed by the appellants in their main brief at page 25, where the facts of the case are pointed out. The "Adventure" was a case, not of a prize entering our ports, in the possession of another friendly sovereign, but abandoned by the prize-master to a neutral, who navigated property which he did not possess into our ports. It was a clear case of salvage, for while the title to the captor country passes by capture, the title did not vest in the officer making the capture, as is pointed out by the Court

of Claims in "Commodore Stewart's" case, 1 Ct. of Claims, 113, and the Manila Prize Cases, 188 U. S., 254, discussed on pages 30 and 31 of appellants' main brief, and consequently his gift passed no title to the donees.

In the "Adventure", the Supreme Court made the distinction very clear when they stated (L. C. 226):

"As between the belligerents, the capture undoubtedly produces a complete divesture of property."

## VI.

### *Immunity of a Friendly Sovereign.*

In point 7 of their brief, the appellees argue that the "Appam" is not a public vessel or entitled to the exemption of a public vessel. Their whole argument rests upon the proposition of whether the "Appam" is a public vessel, and thus they dispose of it, stating that in their opinion the "Appam" was avowedly in the category of a prize. While we maintain that the *Appam* is a public vessel, this is not the controlling factor. The question is whether the *Appam* was the property, legally acquired, in the possession of a friendly sovereignty. It is a fundamental proposition of international law that the courts of a neutral country have no jurisdiction to determine an action against another nation's property in that nation's possession. The fact that it is a prize has never been made a distinction. The "Appam" having entered Hampton Roads in command of a commissioned officer of the German Navy, flying the flag of his country, having been legally captured, was the property of the German Empire and could not be interfered with by the courts of our country. If she had been taken in violation of our neutrality and the capture itself was illegal and, consequently, no title passed to the German Government, then she could be proceeded against, because under such circumstances, she would not be considered the property of a

friendly sovereign. It is for this reason that restitution has only been granted in these particular cases. If the capture itself was legal, then the prize becomes the property of the friendly sovereign and must be treated in accordance with the doctrine enunciated again and again by this court.

The "Parlement Belge", referred to on pages 58 to 60 of appellants' main brief, was not a man-of-war, but a merchant mail packet. The Attorney General of England protested against the jurisdiction of the English courts, not on the ground that she was a public vessel, but because the libelled ship was the property of the King of Belgium in his sovereign capacity.

The appellees seek to distinguish the ruling of the Secretary of State in the "*Farn*" case, referred to by the appellants at page 33 of their main brief, upon the ground that she had been in the possession of the captor for more than three months and was used as a fleet auxiliary or tender and was officered and manned by Germans. Irrespective of the fact that the German Government has claimed the right to enter Hampton Roads under the provisions of the treaty giving asylum to prizes, and although the German Government has stated that the "*Appam*" was not an auxiliary cruiser, but was a prize ship, the appellees now seek to show that the "*Appam*," while less than an auxiliary cruiser, was more than a prize and was a fleet auxiliary or tender. They argue that the "*Appam*" had been in the possession of the captor for more than two weeks and was used to carry prisoners. (Appellees' Brief, pp. 3, 94, 95, 106.) If the appellees are sound in their opinion that the "*Appam*" acted as a tender in taking care of prisoners and thus assisted in military operations, how do they distinguish the "*Farn*" case? They cannot justify the "*Farn*" case, because the "*Farn*" assisted in military operations and hence was not a mere prize, and in the same breath, contend that the "*Appam*" was different because she was a mere prize, but nevertheless committed a

breach of neutrality because she assisted in military operations.

The appellees also seek to distinguish the case of the "*Tuscaloosa*" upon the ground that she had been commissioned as a ship of war and converted as a tender to the "*Alabama*." Subsequently, the "*Tuscaloosa*" did become a ship of war, but Semmes discussed the question solely upon the proposition of a prize:

"Does the fact of my *prize* being in British waters, in violation of the Queen's proclamation, give it this right? \* \* \* The *prize* may be ordered out of the port, but my position is as firm in port as out."

Semmes, *Service Afloat*, page 741.

In the Geneva award, Count Sclopis, President of the Board of Arbitration, in referring to the "*Tuscaloosa*", stated:

"In reality she was a prize."

Moore's *International Arbitrations*, vol. 4, p. 4154.

## VII.

### *Abandonment.*

The appellees, in point 8 of their brief, argue that the "*Appam*" has been abandoned at Hampton Roads. We have discussed this question in our main brief at pages 22 to 24, and have cited a decision of this Court in the case of "*Mary Ford*", 3 Dallas, 188. The appellees cavalierly dismiss this case on pages 92 and 93 of their brief, by stating that it is not a controlling authority and that there was no opinion rendered by the Supreme Court. This is not the fact. The question was so clear to the Supreme Court that they un-animously rendered a short opinion, set forth at page 198. The "*Mary Ford*" is not inconsistent with the "*Adventure*", as is argued by the appellees, because in the case of the

"*Adventure*", the claimants were the donees of the prize master. In the case of the "*Mary Ford*", the captor country made the claim for the proceeds. It is well settled that the captor country had title, while the prize master did not have title until after condemnation. Consequently, the two cases of the "*Adventure*" and the "*Mary Ford*" are very different and the appellees cannot gratuitously overrule the unanimous opinion of the Supreme Court by a subsequent decision dealing with different facts.

The "*Appam*" has been continuously in the possession of the German Government from the time it was captured, on the 15th day of January, 1916. She certainly was not abandoned upon the high seas, because we can safely assume that the former crew and the passengers of the "*Appam*" did not willingly submit to the orders and dictates of the prize master and prize crew. She entered Hampton Roads the property of the German Government. She still flies the flag of the German Navy. She still is under the command of an officer of the German Navy. She still is guarded by the prize crew, sailors in the German Navy. She was in such active possession of the German Government that, upon request, the German Ambassador, in a note of March 14, 1916, assured the Secretary of State "that no attempt to run the vessel away would be made so long as said ship remains in the custody of said court." (Dipl. Corr. Dept. of State, European War No. 3, p. 338.) For the appellees to say that she was abandoned in Hampton Roads is really begging the whole question which is at issue. If she was entitled either to remain here until the prize master chose to leave, or was entitled to remain here until notified to depart, there has been no abandonment, because she still is in the active possession of a friendly sovereign. If she is an abandoned derelict, subject to salvage, then the appellees would not be in need of the assistance of the courts of a friendly nation to obtain a possession legally divested from them upon the high seas.



## VIII.

*Restitution.*

The question of restitution is, aside from the treaty question, the crux of this case. In order for the appellees (libellants below) to be successful, they must prove that the facts of this case authorize the courts of a friendly nation to interfere and restore to a belligerent, property divested from that belligerent upon the high seas. It is obvious that there can be many breaches of neutrality which do not penalize one belligerent in favor of the other belligerent. Breaches of neutrality afford to the neutral only, a complaint against the offending belligerent.

The accepting of a foreign commission by a citizen or subject of a neutral country, would not penalize the belligerent granting the commission in favor of the other belligerent.

Enlisting in foreign service, while certainly a breach of neutrality, does not profit the innocent belligerent.

The arming or augmenting the force of a man-of-war in a neutral port does not forfeit this man-of-war to the other belligerent.

The institution of a military expedition against one belligerent does not result in the offending belligerent being pecuniarily responsible to the innocent belligerent.

It is for the neutral nation to complain against the offending belligerent and collect such damages which result, in accordance with international law. The sole complaint of the innocent belligerent is against the neutral and not against its enemy. Restitution results in the case of a prize which has been illegally captured within our waters or has been taken by a proscribed vessel, simply because the capture being illegal, there has been no divestiture of title, as between the neutral and the belligerents and the title of the owner

still continues. So even restitution in these two strictly limited classes does not follow as a penalty for the breach of neutrality, but since the breach of neutrality affects the validity of the capture, the owner has not been deprived of his property and is entitled to reclaim it.

The appellees argue the question of restitution in points 4 and 9 of their brief. We have discussed this question in point 8 of our main brief, pages 42 to 54. The appellees cite various opinions of this Court.

The *Santissima Trinidad*, 7 Wheaton, 283, was a case where a vessel made a capture upon a cruise which had its inception in an illegal armament in the United States, in violation of our laws. The court held that the capture was illegal, because it had been made in violation of our neutrality laws. The ground of the opinion was carefully put by Mr. Justice Story (L. C. 349), where he strictly limited the decision to the cases which had gone before, and even seriously questioned the soundness of those decisions permitting restitution where our sovereignty was infringed.

"It does not lie in the mouth of wrongdoers to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported. More especially as no inclination exists on the part of the court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled that, as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own courts

or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our courts. But the practice from the beginning in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it."

In the case of *Briggs vs. Light Boats*, 11 Allen, 157, Judge Gray commented upon the "*Santissima Trinidad*" as follows:

"The decision in the *Santissima Trinidad*, 7 Wheaton, 283, that prize ships or goods captured by a foreign armed ship on a cruise for which she had been fitted out in a port of the United States in violation of our neutrality might be restored at the suit of the owner in the courts of the United States, sitting as courts of prize, was governed by the principle of international law by which a capture made by a ship on a cruise originating in such violation of neutral territory gives the captor, as against the neutral, no right to the property captured, and the prize court of the neutral as administering the law of nations, may restore the property, if it were found within their jurisdiction, to the party injured."

The other Supreme Court cases relied upon by the appellees and cited on pages 62 and 63 of their brief, are cited in our brief. In all of these cases, the courts gave no redress except where there was a violation of our neutrality, inherent in the capture.

In the case of the "*Divina Pastora*," 4 Wheat., 52, the captured property was restored to the possession of the captors.

The case of the "*Arrogante Barcelones*," 7 Wheaton, 496, is not cited in our brief, but was the case of a capture made by a vessel illegally equipped within the United States.

On page 67 of their brief, the appellees cite the Foreign

Jurisdiction Act of Great Britain. This act, by its very terms, affords restitution, only where the capture was made within the territorial limits of England, or by a ship illegally equipped in England. The English proclamation of neutrality, cited on page 18 of the appellees' brief, is to the same effect, affording a remedy or detention of vessel only if the prize "shall have been captured by any violation of the territory or territorial waters of Her Majesty."

On page 70 of their brief, the appellees attempt to distinguish certain cases cited by us, upon the authority of *Rose vs. Himely*, 4 Cranch, 241. This case was not a prize case, but arose on the instance side of the court. Chief Justice Marshall observed in the second case of *Hudson vs. Guestier*, 6 Cranch, 281 (L. C. 285):

"The principle of that case (*Rose vs. Himely*) is now overruled."

The appellees do not correctly state our position when they say that we argue that there should be no restitution, simply because there is no specific statute or express decision of our courts to that effect. Our position is that as a matter of principle there can be no restitution save in the two classes of cases of illegal capture, because in those classes only the sovereignty of the neutral has been violated and there is no title of a friendly sovereign intervening.

On page 69 of their brief, the appellees state that we have cited no case in which it has been held by our courts that any belligerent ever had a right to send a prize into our ports, immune from the jurisdiction of any department of our government.

In the case of the "*Josefa Segunda*," 5 Wheaton, 338, the court said:

"The courts of neutral nations have no right to interfere, except in cases which do not embrace the present capture."

In the case of the "Alerta", 9 Cranch., 359, Washington, J., stated:

"There are exceptions which are as firmly established as the rule itself."

And L. C. 364, he stated the exceptions, namely,

"capture within the territorial limits or by a privateer illegally equipped in this country,"

and limited the right of restitution solely to such property "illegally captured."

In *La Amistad de Rues*, 5 Wheaton, 385, Mr. Justice Story limited restitution solely to the cases where "a capture is made by any belligerent, in violation of our neutrality."

The case of the "Alerta", 9 Cranch., 359, was cited with approval as the controlling authority in the case of *Juando vs. Taylor*, 13 Fed. Cas. No. 7558, at page 1187. Judge Van Ness, after reviewing and quoting from the opinions of the Supreme Court, stated:

"These are all the cases which it seems necessary to examine. They afford a perfect view of the law, as laid down by the Supreme Court; and it is plain that *the utmost extent of the doctrine* they maintain is, that captures made by vessels equipped in a neutral nation are illegal only in relation to such nation, and if they are brought *infra presidia* her ports, restitution will be ordered; no other remuneration is held forth; no other resource is opened to the captured complainant. It will not be denied that *an exception to a general rule is to be taken strictly*; that it goes no further than its terms clearly imply. Indeed, it would be impossible upon any known principles of admiralty or prize law, to take jurisdiction and award restitution *under any other circumstances*."

In *Solderondo vs. The Nostra Signora*, 21 Fed. Cas., 225, and *Reid vs. Vere*, 20 Fed. Cas., 488, prizes were brought into our ports without convoy. No claim was made of illegal capture. The courts held that restitution could not be decreed.



On page 44 of our brief, we have cited the note of Jefferson, then Secretary of State, where he limited restitution "only in two cases", namely, capture within our territorial waters or by proscribed vessels.

On page 44 of our brief, we refer to a similar statement by Washington, in his address to Congress, and on page 35 of our brief, a similar statement by Monroe.

The most recent text-book upon the doctrine of neutrality is the work entitled "The Neutrality Laws of the United States", by Charles G. Fenwick, published by the Carnegie Endowment for International Peace.

At page 90, Fenwick discusses this question:

"In other words, where vessels have been fitted out and armed, or have increased their force, in violation of the neutrality of the United States, the courts of the United States will intervene to effect restitution of prizes captured by such vessels, not because the capture is illegal as between the captor and the former owner, *but because the neutral state has the right to vindicate its own sovereignty, by divesting possession of property acquired as the result of a violation of its sovereignty.*"

Wheaton, in his work on "International Law," edited by Dana, at page 479, Section 388, states:

"This jurisdiction of the national courts of the captor, to determine the validity of captures made in war under the authority of his government, is exclusive of the judicial authority of every other country, *with two exceptions only*:—1. Where the capture is made within the territorial limits of a neutral state. 2. Where it is made by armed vessels fitted out within the neutral territory."

Upton, in his "Law of Nations", states:

"But though captures may not be made within neutral jurisdiction, yet, being made outside, and brought into neutral ports, *no power of restitution or release*

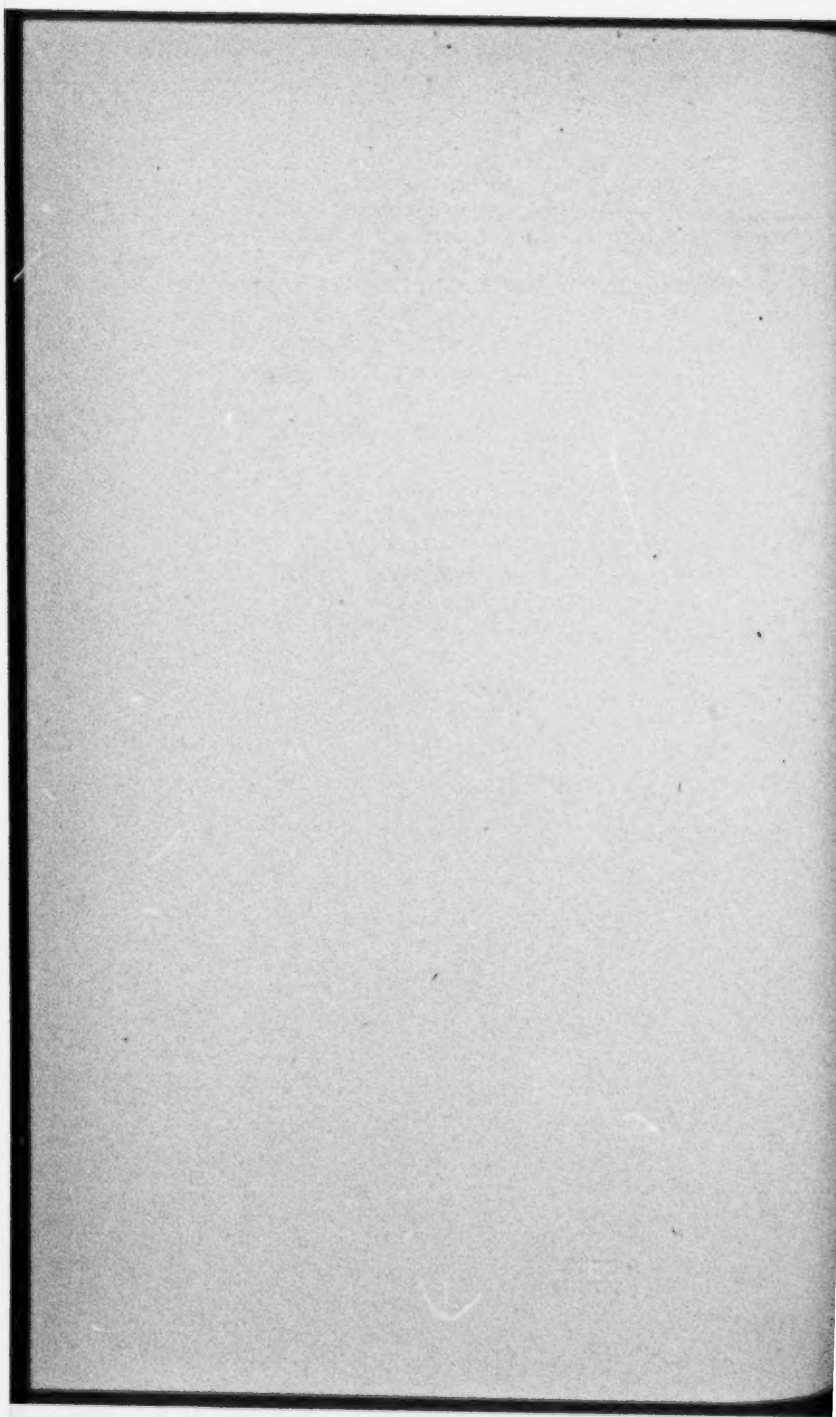
*exists on the part of the neutral except where some treaty intervenes, or the capture has been made in violation of its own neutrality laws and regulations."*

It is thus clear that not only has the Supreme Court limited restitution to the two classes of illegal capture, but that these two exceptions have been consistently recognized as the two sole exceptions and have never been extended.

Respectfully submitted,

JOHN W. CLIFTON,  
FREDERICK W. LEHMANN,  
NORVIN R. LINDHEIM,  
ROBERT M. HUGHES,  
WALTER S. PENFIELD,  
*Counsel for Appellants.*

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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1916

No. 650

HANS BERG and L. M. VON SCHILLING

Appellants

vs.

THE BRITISH AND AFRICAN STEAM NAVIGATION COMPANY,  
Limited

Appellee

No. 722

HANS BERG and L. M. VON SCHILLING

Appellants

vs.

HENRY G. HARRISON

Appellee

**SUPPLEMENTAL REPLY BRIEF FOR  
APPELLANTS**

JOHN W. CLIFTON  
FREDERICK W. LEHMANN  
NORVIN R. LINDHEIM  
WALTER S. PENFIELD

Counsel for Appellants





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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1916.

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HANS BERG, Prize Master in Charge  
of the Prize Ship "Appam", and  
L. M. VON SCHILLING, Vice Con-  
sul of the German Empire,

*Appellants,*

No. 650.

*vs.*

BRITISH & AFRICAN STEAM NAVI-  
GATION COMPANY, Limited,

*Appellee.*

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HANS BERG, Prize Master in Charge  
of the Prize Ship "Appam", and  
L. M. VON SCHILLING, Vice Con-  
sul of the German Empire,

*Appellants,*

No. 722.

*vs.*

HENRY G. HARRISON, Master of the  
Steamship "Appam",

*Appellee.*

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**SUPPLEMENTAL REPLY BRIEF  
FOR APPELLANTS.**

This memorandum is in reply to the supple-  
mental memorandum submitted by the appellees  
in No. 650, and is also in reply to the supple-  
mental memorandum submitted by the appellees

in No. 722, entitled "Notes of Oral Argument Supplementing the Brief in Behalf of the Appellees". This supplemental brief in No. 722 was filed without the knowledge of the appellants, and was not known to them until the day following the argument. In view of the fact that the appellees, in this brief, have argued questions not only not raised in their former brief, but not even upon argument, we have addressed this memorandum in reply to both of these briefs.

The appellees' two supplemental briefs assume that the "Appam" entered Hampton Roads in violation of our laws and international law. In Point 12 of our main brief, at pages 103-106, we argued, and cited many authorities substantiating the proposition that where a neutral country has failed, by proclamation, to prohibit the entrance of prizes into her ports, the permission to enter must be assumed. This has been held not only by this Court, but there is practical unanimity to this effect among all of the writers on international law.

In appellants' reply brief, pages 1 and 2, it was pointed out that the appellees, in their main brief, wholly ignored this question, and that consequently the validity of this proposition should be assumed. Upon argument and in the two supplemental briefs filed, the appellees likewise refrained from discussing this question, and have offered no authorities in any way to the contrary. The appellees thus tacitly admit the correctness of this proposition and the "Appam" thus had the full and legal right to enter Hampton Roads. This doctrine was ably stated by Attorney General Cushing (7 Op. Atty. Gen., 122) :

"But a neutral power may be so confident in its own strength, or so remote from the immediate scene of war, as not to have con-

ceived it necessary to issue any regulation on the subject of belligerent asylum. In that case, the right of asylum is presumed; for it would be unjust for the neutral State to reject it without previous notification to the belligerent States (Vattel I, iii, ch. 7, sec. 132; Wheaton, p. 478), and such at the present time is the relation of the United States to this question."

The opinion of Attorney General Cushing was reaffirmed by Secretary of State Evarts in 1880. (Reply brief for appellants, pp. 28-29.)

It should be remembered that men-of-war of a belligerent nation have the right not only to enter our ports, but likewise to be interned here and remain fully protected against the attacks of their enemy within the ports of the United States, during the pendency of the war. They may come in and make repairs and need not leave except before the termination of the period of twenty-four hours after they have been notified to depart. The American rule in reference to this is clearly set forth in the note of Mr. Lansing to the German Ambassador, dated October 30, 1914, in which he notified the German Government that three weeks were allowed the "Geier" for repairs, and that she must depart within twenty-four hours after the expiration of such three weeks or be interned. (Dipl. Corr., Dept. of State, European War, No. 2, p. 50.)

This rule is likewise announced in the various neutrality proclamations of the President of the United States during this war. In this connection, it should be pointed out that while the President saw fit to regulate the entrance of men-of-war into our ports during this war, all of his general neutrality proclamations are conspicuously silent in reference to prizes.

### **The Breach of Neutrality.**

In order to find restitution, the appellees must found their claim upon a breach of neutrality. In the reply brief for the appellants, at pages 3-7, we showed that the breach of neutrality relied upon by the appellees was not a definite act, but an intention. There certainly was no breach of neutrality while the "Appam" was upon the high seas. There was no breach of neutrality in entering Hampton Roads, because the "Appam" had, at the very least, the right to enter and remain until notified to depart. There could, under no circumstances, have been any breach of neutrality after the 16th day of February, for on that day the Federal Court took custody and charge of the "Appam" and placed the vessel under its protection, and from that date it was impossible for the "Appam" to leave.

The statement at the end of the appellees' supplemental memorandum in No. 650, attempting to insinuate that the appellants on page 35 of the Appellants' Reply Brief denied the custody of the District Court, is a mere quibble. In appellants' reply brief, at page 3, it was specifically stated that after the libel was filed, the "Appam" was in the custody and under the care and protection of our Federal Court, and agreed with the contention of the appellees, at page 74, that her presence in American waters, at and after that time, was therefore legitimate. The custody and control of the District Court in these cases has been fully and implicitly recognized by the appellants, and the insinuation in the supplemental memorandum is quite out of point.

The appellants in their reply brief referred on page 35 only to the question of abandonment, which question obviously was of no further effect

after the libel was filed. The appellants emphatically deny any intention to controvert the custody of the United States Court. They were discussing the situation solely as between the parties litigant and not with any view of questioning the possession or control of the District Court over the res. The very letter quoted on page 35 of the appellants' reply brief was an admission that the vessel was still "in the custody of the said Court." The printed record on page 95 shows beyond controversy that the ship is in the custody of the District Court; for the last two paragraphs of the final decree provide for her being held in the custody of the Marshal pending any appeal and for the proper protection while in said custody. In fact, the appellants rely upon this fact of the custody by the court as an answer to any question that there could have been a breach of neutrality after the libel was filed on February 16, 1916.

The German Government never requested the internment of the passengers but merely the internment of such military forces of Great Britain as had been captured. In fact, the Chief Engineer of the "Appam", one of the crew, testified that he left the "Appam" on the 3d day of February, and that nobody was left on board except Lieutenant Berg, twenty-two of the prize crew and the German civilians and German military prisoners who were released when the "Moewe" captured the "Appam", about twenty in all. (Record, p. 27.) The crews of the captured British ships and the passengers of the "Appam" left either on the 3d day of February or prior thereto. (Record, p. 28.)

The German request is sanctioned in our own history, for in the Revolutionary War, John Paul Jones entered the port of Texel, Holland, with five hundred prisoners, and notwithstanding the pro-



test of the English, remained in that port with the sanction of the Dutch Government for many months. The argument of the appellees on this point is fully met by the fact that when our Department of State ruled that these military prisoners could not be interned, they had previously thereto been released.

The suggestion of the appellees that the capture was not made effective until the "Appam" entered Hampton Roads ignores the facts which appear in the record. The "Appam" was captured on the 15th day of January, 1916, and remained in the immediate proximity of the "Moewe" until the 18th day of January, and remained in touch with the "Moewe" until the 23d day of January, over a week after the capture. (Record, p. 27.) She was thus in complete military possession of the German Government long before she entered the neutral port at Hampton Roads. Lieutenant Berg navigated the "Appam" whither and where the German military authorities desired. There could not be clearer evidence of complete control in the German Government. Any contention that undue force was used upon the British crew in entering Hampton Roads is not borne out by the record, for the British officers of the "Appam" testified that when the "Appam" entered Hampton Roads, the arms and bombs were not in evidence, and that the German military force had laid down its weapons upon entrance into American waters. (Record, No. 650; pp. 24, 28, 38, 52.)

The appellees' contention would seem to be that there was some breach of neutrality in bringing the crew and passengers of the "Appam" into an American port. Such breach of neutrality, their argument seems to be, would not have occurred if the passengers and crew of the "Appam" had been

put off in small boats outside of the three-mile limit. Are the appellees relying upon this distinction? Are they serious in their contention that, because the passengers and crew were safely brought to an American port on board the steamer, the ship should be turned over to the former British owner?

The appellees further state that the "Appam" entered the port at Hampton Roads with the intention to remain during the pendency of the war. This is not the fact. The claim of the "Appam" was that she intended "to stay in an American port until further notice". (Reply brief for appellants, pp. 6-7.) No notice has been given, and even our Secretary of State has ruled that the "Appam" did not commit a breach of neutrality by coming into Hampton Roads and remaining there until the time when the libels were filed in these cases. (Reply brief for appellants, pp. 4-5.)

The appellees lay stress upon the commission from Count zu Dohna to Lieutenant Berg and from this adduce their "breach of neutrality". It is, however, admitted that if the "Moewe" had accompanied the "Appam" into Hampton Roads, there would have been no breach of neutrality. If Count zu Dohna, in command of the "Moewe", had entered the port at Hampton Roads and had there given these instructions to Lieutenant Berg, there would have been no breach of neutrality in entering or remaining until notified to depart. The argument of the appellees seems to be that since Count zu Dohna did not personally enter the port at Hampton Roads and there give his order, but instead gave it in writing, that this act of his, off the African coast, thousands of miles away, was a breach of the neutrality of the United States.

The appellees refer, in their supplemental briefs, and upon the argument alluded to articles written by Dr. James Brown Scott, in the *American Journal of International Law*. In the article by Dr. Scott, entitled "The Case of the *Appam*" (Volume 10, *American Journal of International Law*, page 824), Dr. Scott pointed out that the "*Appam*" did not come in as a mere trespasser, but in the belief that it had a right to enter an American port, and, consequently, there was no violation of the law of nations, or the laws of this country. He stated (l. c.), 824:

"The interpretation of the treaty might well be considered as open to doubt, and a vessel coming into American jurisdiction under claim of a treaty right, which it cited as an express authority for entrance, can not well be considered as a trespasser in the sense of the *Chesapeake*, which had no claim of right. If the Department of State had accepted the German interpretation of the treaty, the *Appam* would not have been a trespasser, and in this case it would not have violated neutrality as interpreted by the United States. Until the United States decided the question adversely to the vessel, it would seem that the *Appam* was not a trespasser, and that it could not be considered to have violated American jurisdiction. It certainly was admitted, because it was not excluded; and it certainly was allowed to remain in the United States pending investigation of the question, for neither the Commander nor the German Government had been given notice for the vessel to depart."

As authority for this proposition, he cited the note of Secretary Lansing of April 4, 1916, to the British Ambassador, heretofore referred to. He further stated (l. c. 825.):

"It would seem that, inasmuch as the *Appam* entered American jurisdiction under a

claim of right, which right was regarded doubtful by the United States Government, it was properly within our jurisdiction until it was decided by the Government that the treaty in question did not grant this right, and that the right claimed did not exist under general international law; and that the vessel became a trespasser and liable to forfeiture and restitution only after it had been informed by the United States that its presence under the circumstances was in violation of the rights of this Government and compromised the neutrality of the United States."

He further stated (l. c. 831):

"The case would be different if the United States had refused the *Appam* permission to enter or if, upon notice of its entrance, the government had ordered the vessel to depart as its presence violated American neutrality. Being allowed to enter and not being notified to depart, it would seem that there is ground for the contention that until the United States notified the *Appam* that its presence was, under the circumstances, a violation of American neutrality, the vessel was not a trespasser and was justified in remaining under such conditions as the United States might impose until its right to enter and to remain had been decided."

The argument of the appellees in the supplemental memorandum in No. 650, that the German possession of the "*Appam*" was *vitiosa* and *mala fide*, because contrary to international law, begs the whole question. Appellants contend that not only had the "*Appam*" the right to enter an American port, but that she had the right to remain here until notified to depart.

At page 2 of the supplemental brief in No. 650, appellees argue that if the contention of the appellants be upheld, the United States is left without power to protect itself. This does not cor-

rectly state the position of the appellants. If the case of the Appam is construed to come within the provisions of the treaty, then the right is conferred on the Appam to enter and remain in our ports. This Government has ample power to protect itself and can, whenever it sees fit, order the "Appam" to depart, except as may be limited by the provisions of the treaty.

The question is not whether the United States is without power to protect itself, but whether a private owner can sue a sovereign power under the circumstances of this case. This is a most important question and not a technical one, as suggested by the appellees. So important a question is this one of sovereignty, that after the decision of this Court, on the question of private citizens suing States, Congress and the States of the Union solemnly amended the Constitution of this country.

As stated by Justice Livingston in the "Estrella", 4 Wheaton, 298 (l. c. 309) :

"But it is no departure from this obligation, if, in a case in which a captured vessel be brought or voluntarily comes, *infra praesidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality *by the vessel which has made the capture.*"

In Halleck's International Law, volume 2, page 426, the author states this rule in almost the identical language.

This is a clear statement of one of the principles behind the rule that there can be no restitution in the Courts of a neutral country, to a private owner except in the two classes of cases. Where there has been no breach of neutrality inherent in the capture, which necessarily must be made by the captured vessel, there can be no restitution.



### Legal Effect of the Capture.

The supplemental briefs filed by the appellees are chiefly concerned with the legal effect of the capture. The legality of the capture has never been disputed. Not satisfied with the decisions of this Court, the appellees seek to found their arguments upon certain ancient doctrines of the nations. They discuss the question of the effect of recapture, *infra praesidia*, and the *jus postliminium*. We contend that their arguments indicate misconceptions of these old rules.

In ancient times, captures were effected not only by the armed vessels of war, but by privateers. These privateers were frequently lightly armed. On account of this, there arose the rule of pernottation, namely, that the capture would be considered effective if the night passed, or as it was expressed, after the lapse of twenty-four hours. But even if the twenty-four hours did not pass, the capture was always considered effective if the prize was brought *infra praesidia*. *Infra praesidia* has never meant "within the jurisdiction of the captor country", but the possession was always deemed firm and the capture legal if the prize was brought *infra praesidia* a home port, a port of an ally, a *neutral port*, or within the protection of the fleet. To-day, with privateering abolished since 1856, these questions do not arise, and the capture becomes effective when the vessel is in the military possession of a commissioned officer of the sovereign state, after a legal capture.

In many countries, an exception has been engrafted upon the Law of Nations by municipal enactment, and in the event of recapture, the prize, by means of this municipal enactment, has been restored to the former owner who had lost his title upon the capture. As we shall subse-

quently show, this doctrine differed in different countries and was a rule decided upon by certain countries, in order to do equity to their citizens. The possibility of recapture is not a legal doctrine, but as the Supreme Court termed it in the "Adventure", 8 Cranch., 221 (l. c. 226) it was a mere *spes recuperandi*. From this evanescent hope, the appellees find in the original owner some empty, fugitive title. That it was not a legal title was clearly evident from the decision in the case of *M'Donough vs. Dannery*, 3 Dallas, 188, in which the Court said (l. c. 198), that upon the capture, "the captors acquire such a right as no neutral nation could justly impugn or destroy." And the Court found that even though the "Mary Ford" was abandoned and the captors were no longer in possession, nothing remained in the original owners.

The appellees, in their supplemental brief in No. 722, attempted to distinguish the "Mary Ford", and argued that it was in conflict with the case of the "Adventure", and consequently overruled. The distinction between these cases, is set forth in appellants' reply brief, pages 34 and 35, but after the decision of the "Adventure", which is not in conflict with the "Mary Ford", but which nevertheless appellees gratuitously state overrules the "Mary Ford", this Court handed down a decision in the "Invincible", 1 Wheaton, 238, where the Supreme Court recognized the doctrine of the "Mary Ford".

In the case of *Booth vs. L'Esperanza*, Bee 92, a case of salvage, where a captured prize was brought into our port, the Court held that after the payment of salvage, the residue must be paid to the captors and not to the original owner.

There could be no clearer statement of the legal effect of the capture than the ruling of Secretary

of State Lansing in this war, that the decision of a prize court is not necessary to pass title, but that immediately upon capture of an enemy vessel, title passes to the captor country, and that if no prize court is available, there is no duty in the captor to release his prize or to refuse to use the prize. This note is set forth in our main brief on page 33.

Even where the rights of individual captors intervene after condemnation, their title relates back to the date of the capture. As was stated by Chief Justice Marshall in *Williams vs. Armroyd*, 7 Cranch., 423 (1. c. 433), "the condemnation relates back to the capture and affirms its legality." This same rule is announced in the *Manila Prize Cases*, 188 U. S., 254.

There is practical unanimity among the text book writers on this proposition. Hall, in his "International Law", 5th Edition, page 618, states:

"The right of the captor to that which unquestionably belongs to his enemy is no doubt complete as between him and his enemy, so soon as seizure has been effected."

Westlake, Volume 2, at page 242, says:

"A prize sailing under the war flag of her captors, stands in principle, for the purpose of her reception into a neutral port, on the same footing as if she had originally belonged to her captors."

Wheaton, in his work on "International Law", 8th Edition, edited by Dana, says at page 480:

"A trial by a prize tribunal is not a right enemies can claim, nor a duty to them. They have no standing in court. If it be assumed that all captures are enemy's property, there need be no prize courts. But the fact that

so large a proportion of them are of neutral property charged as involved in violation of rights of war, or of property whose nationality as neutral or hostile is doubtful, has led to the establishing of these tribunals. Their origin is in the responsibility of the belligerent government to *neutral* governments, for the acts of its cruisers."

Similar statements can be found in the following textbook authorities:

Tiverton; *The Principles and Practice of Prize Law*, pages 22-23; Wheaton: *Captures*, page 264; Hautefenille: *Nations Neutres*, Volume 2, page 310; Phillimore: *International Law*, Volume 3, Secs. 380, 404; Davis: *Elements of International Law*, 3d Edition, page 362; Calvo: *Le Droit International*, 3d Edition, Book 7, Volume 4, Sec. 2875; Walker: *International Law*, page 152; Desty: *Federal Procedure*, 9th Edition, page 299; Appendix to 2 Wheaton, page 21.

#### *Infra Praesidia.*

The appellees have failed to realize that "infra praesidia" applies not only to a home port of the captor country, but also to a neutral port. It refers not to bringing a vessel into the jurisdiction of the captor country, but into a place of safety, and this Court has, in several decisions, made this clear. The text-book writers are to the same effect.

In *Hudson vs. Guestier*, 4 Cranch., 293, Chief Justice Marshall stated (l. c. 295), referring to condemnation:

"The practice of nations requires that the vessel shall be in a place of safety before such sentence can be rendered. *In the port of a neutral she is in a place of safety and the possession of the captor cannot be lawfully devested*, because the neutral sovereign, by himself or by his courts, can take no cognizance of the question of prize or no prize.

\* \* \*

*"A vessel captured as prize of war is, then, while lying in the port of a neutral, still in the possession of the sovereign of the captor, and that possession cannot be rightfully divested."*

In Wheaton's dispatch to the Secretary of State, dated November 10, 1843, cited in our main brief, at page 63, Wheaton called attention to the fact that the military right of possession of our Government, in the Bergen Prize Cases, was "continued in the neutral port into which the prize was brought."

In Wheaton's International Law, 5th Edition, edited by Phillipson, it is stated, at page 594:

*"So, also, Bynkershoek states the General Maritime Law to be, that if a ship or goods be carried infra praesidia of the enemy, or of his ally, or of a neutral, the title of the original proprietor is completely divested."*

In Halleck's International Law, Volume 2, at page 436, he states:

*"It was at one time supposed that a prize court, though sitting in the country of its own sovereign, or of his ally, had no jurisdiction over prizes lying in a neutral port. Sir William Scott admitted that, on principle, the exercise of such jurisdiction was irregular, as the court wanted that possession which was deemed essential in a proceeding in rem; but he considered that the English Admiralty had gone too far in its practice, to be recalled to the original principle. Sir William Grant, in delivering the judgment of the Court of Appeals, in the same case, expressed the same opinion, and the English rule is now considered as definitely settled. The Supreme Court of the United States has followed the English rule and has held valid the condemnation, by a belligerent court, of prizes carried into a neutral port and remaining there, the practice being justifiable on the*



ground of convenience to belligerents, as well as neutrals; and though the prize was, in fact, within neutral territory, it was still to be deemed under the control, or *sub potestate*, of the captor, whose possession is considered as that of his sovereign. *It may, also, be remarked, that the rule thus established by the highest courts of England and the United States, is sanctioned by the practice of France, Spain, and Holland.*"

To the same effect, see *Rose vs. Himely*, Bee 313; *Moodie vs. Amity*, 17 Fed. Cas., 650, No. 9741; Wheaton: International Law, Dana Ed., 477; Lawrence: Principles of International Law, 482.

The cases of "The Flad Oyen" and "The Polka", relied upon by the appellees and cited by the District Court, in its opinion, do not represent the law of England, as is indicated by the authorities on International Law and subsequent English cases. These cases and the English rules on this subject are discussed on pages 15-17 of the reply brief for appellants. The case of the "Flad Oyen" has been considered by Chief Justice Marshall in *Rose vs. Himely*, 4 Cranch., 241 (l. c. 270) as follows:

"The case of the Flad Oyen, 1 Rob., 135, was a vessel condemned by a belligerent court sitting in a neutral territory; consequently, the objection to that sentence turned entirely on the defect in the constitution of the Court."

The case of the "Polka", Spinks 447, as was stated by Dr. James Brown Scott, in his article on "The Case of the Appam", American Journal of International Law, Volume 10, page 829, should not be taken as a precedent since irrespective of the Court's dictum, the Court took jurisdiction and recognized the condemnation of a prize lying in a neutral port.

*Recapture.*

The error in the argument of the appellees, relating to recapture, is that they seek to take an exception engrafted upon the Law of Nations, as a rule of international law, instead of recognizing it as a mere municipal enactment. In the case at issue, the doctrine of recapture has no effect whatsoever, since the "Moewe" reduced the "Appam" to possession and did not leave her until over a week after the capture. The appellees seek to supplement the facts with their unfulfilled hopes. They want the effect of the recapture without the act itself. A recapture occurs upon the high seas. The long cruise of the "Appam" afforded sufficient opportunity for recapture and that question passed upon the entrance of the "Appam" into a neutral port, in accordance with the decisions of this Court and the opinions of the authorities on international law. Recapture, on principle, places the title in the recaptor, but by municipal law, in order that a nation may do equity to its citizens, through a fiction of the law, and because of the legislative enactment to that effect, a title which had been divested is replaced in the former owner. This reason for the rule is pointed out by Sir J. Marriott in the case of the "Renard", Hays & Marriott, 222; also cited in 1 Roscoe's Prize Cases, 17. The Court, in the opinion in that case, pointed out that there was something ridiculous in the various rules and that there was no principle of international law involved. The Court stated:

"A pedantic man in his closet dictates the law of nations. Everybody quotes, and nobody minds him. The usage is plainly as arbitrary as it is uncertain."

The Court, in that case, said that the reason

for the restoration of the lost title to the former owner was:

"it is equity, that the British subject has always a right to his own again, when found in the hands of another British subject."

The appellees seek to extend this anomalous exception to a point not even dreamed of by the dictators of the rule. They can cite no case to sustain their conclusions drawn from the works of the early writers on international law. The conclusions of the appellees do not even follow from these early writers when their entire writings are read and attention paid to those portions of the texts which were not quoted by the appellees.

#### *Jus Postliminium.*

The *jus postliminium* is not a right or even a vestige of title. It is a fiction of law invented in order to do equity where the property of one citizen, lost through an act of war, is found again in the hands of his own state. It is well-defined by Bouvier, in his Law Dictionary, Volume 3, page 2643, Rawles Edition, as follows:

"*Postliminium*. (Lat. from post, after, and limen, threshold.) A fiction of the civil law, by which persons or things taken by the enemy were restored to their former status on coming again under the power of the nation to which they formerly belonged. Calvinus, Lex. 1 Kent 108. It is also recognized by the law of nations. But movables are not entitled to the benefit of this rule by strict law of nations unless promptly recaptured. If recaptured after twenty-four hours they vest in the recaptor, subject amongst most nations, to re-vest in the owner, upon payment of military salvage; Risley, Law of War, 143.

"The rule does not affect property which is brought into a neutral territory; 1 Kent

108. It is so called from the return of the person or thing over the threshold or boundary of the country from which it was taken."

It is an internal practice and does not concern the neutral state. It rests in this country upon the Statute of Congress referred to by the appellees. In England it is contained in Section 40 of the Naval Prize Code of 1864. The rule is different in different states and the very differences in the rule show that no principle can be adduced from it. In the United States, upon recapture, the title is given by the captor country to the original owner, provided that the recapture was before condemnation. In Great Britain it is given to the former owner irrespective of whether it was recaptured before or after condemnation. This is clearly shown in the appellees' Supplemental Brief, in No. 650, page 16. The appellees cannot find the necessity for condemnation because of this ancient rule, as it is in the discretion of each nation to do what it pleases with its own recaptured property, whether before or after condemnation.

In Chitty's Law of Nations, it is said at page 94:

"But the right of *postliminium* does not take effect in neutral countries, for when a nation chooses to remain neuter in war, she is bound to consider it as equally just on both sides, so far as relates to its effects, and consequently to look upon every capture made by either party as a lawful acquisition. To allow one of the parties, in prejudice to the other, to enjoy in her dominions, the right of claiming things taken by the latter or the right of *postliminium*, would be declaring in favor of the former, and departing from the line of neutrality."

Halleck, in his work on "International Law", Volume 2, page 538, states:

"Sec. 6. The rights of postliminy, with respect to things, do not take effect in neutral countries, because the neutral is bound to consider every acquisition made by either party as a lawful acquisition, unless the capture itself is an infringement of his own neutral jurisdiction or rights. If one party were allowed in a neutral territory to enjoy the right of claiming goods taken by the other, it would be a departure from the duty of neutrality. Neutrals are bound to take notice of the military rights which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. The fact must be taken for the law."

*Authorities cited by the appellees.*

The appellees, in their Supplemental Brief, in No. 722, recognize the difficulty in meeting *Commodore Stewart's Case*, 1 Court of Claims, 113. They argue that Dr. James Brown Scott was wrong in his opinions in his articles in the *American Journal of International Law*, because he relied upon *Commodore Stewart's Case*, and that the Court was wrong in that case because the authorities cited by the Court do not sustain the proposition. They cite various authorities relied upon by Chief Justice Casey in *Commodore Stewart's Case*, but they ignore the decision of Mr. Justice Story in the "*Emulous*", 1 Gall., 569, in which Mr. Justice Story stated:

"It is now clear that all captures in war inure to the sovereign, and can become private property only by his grant."

But the other authorities cited by Chief Justice Casey in *Commodore Stewart's Case* substantiate this proposition.

The appellees, in their Supplemental Brief, in No. 722, pages 4-5, cite certain portions from the



various text-book writers, but have not seen fit to fully quote from these authorities. They quote from Grotius, Book 3, Chapter 6, Section 3. There Grotius stated:

"But by a later Law of Nations, especially of these of Europe, it is thus judged, namely, if the things taken continue in the possession of the enemy twenty-four hours, then are they accounted for lost."

The appellees speak of Kluber's Work on "*Droit des Gens Moderne de l' Europe*" section 254, page 362, and without quoting from him, state that he holds that the prize must be taken *infra praesidia*, insinuating that this means within the home port of the captor country. Kluber did not say this. He stated that the prize should be taken to the territory of the country of the captor vessel or privateer, or *into a neutral port*, or within the shelter of the squadron. The French reads as follows (l. c. p. 363):

"lorsqu'il a été transporté sur le territoire appartenant au gouvernement du vaisseau ou armateur qui l'a pris, *ou dans un pays neutre*, dans un port, ou a l'abri d'une escadre."

The appellees quoted from Vattel, Book 3, Chapter 13, Section 196, on the right of *postliminium*, but they failed to quote Section 208, holding that the right of *postliminium* is of no force among neutral nations:

"Now the right of *postliminium* is of no force among neutral nations; for the power inclined to remain neuter in a war must look on it, as to the facts, equally just on both sides, and consequently to consider whatever is taken by either, a lawful acquisition."

Heffter, cited by the appellees in their Supplemental brief, (No. 722, page 5) speaks solely of booty captured in land warfare, and has no refer-

ence to the laws of maritime warfare in the sense that the appellees would imply.

The authorities relied upon by the appellees in their Supplemental Brief, in No. 650, upon examination, do not substantiate their contentions.

They make much of Bluntschli and cite his work as controlling authority. Bluntschli was a Swiss who later became a professor of law in German Universities. In 1868 he wrote a book entitled "Das Moderne Völkerrecht der Civilisirten Staaten, als Rechtsbuch dargestellt". By its very title it designated itself; it was not a text book of international law, but a proposed code of the nations which Bluntschli hoped might some day be adopted by the great powers. It has never been recognized as expressing existing international law, but merely the work of a great writer who raised moot questions for future discussion. Holtzendorff, the great German authority on international law, pointed this out in his monograph on Bluntschli, published in Berlin in 1882, pages 31 and 32.

The English translation used by the appellees on pages 9 and 10 of their Supplemental Brief, in No. 650, is a translation from the French edition of Bluntschli, which is not a correct translation of the German text. Bluntschli never stated that prior to condemnation neither the captor nor the government had rights over the vessel or its cargo. Bluntschli used the words "formelles Recht", namely, that until condemnation there was no title which had been recognized by a court. This is obvious.

The appellees in their Supplemental Brief, in No. 650 also cite Bonfils, *Manuel de Droit International Public*. They refer to Section 1416, which represents the individual opinion of Bonfils. Immediately after Section 1416, in Section 1417,

Bonfils admits that the international practice is to the contrary. He says in Section 1417:

"International practice and individual legislation have not recognized this rational solution".

The French version is as follows:

"La pratique internationale et plusieurs législations particulières ont méconnu la solution rationnelle."

The appellees further cited the case of the *Star*, 3 Wheat. 78 and *Oakes vs. United States*, 30 Ct. Cl. 378.

The quotations from the *Star* on pages 16 and 17 of the appellees' Supplemental Brief in No. 650 indicate that Justice Story's opinion was that firm possession changed the title to the property. He stated the different rules and then concluded that if there was any doubt at all the sentence of condemnation would settle any question. This is all that is stated by Mr. Justice Story.

The case of *Oakes vs. United States* referred to a capture upon an inland river and not upon the high seas and hence did not refer in any way to the law of maritime capture.

The old English case of the *Beaver*, 3 C. Rob., 292, was a decision of Lord Stowell under the British Act authorizing the restoration of a prize upon re-capture to the former owners.

The other two cases of the *Emily St. Pierre* and *Experience*, cited on page 17 of the appellees' Supplemental Brief in No. 650, were cases of neutral ships rescued after capture for breach of blockade; they were not enemy ships and consequently no title passed to the captor government, as was the case of the *Appam*.

The appellees, in No. 720, refer, at page 7 of their Supplemental Brief, to the case of the *In-*

vincible. This was a case of a French vessel captured by a British man-of-war while France and England were at war. At the same time we were at war with England and an American privateer captured the vessel from the British; it was re-captured again by the British and again re-captured by an American privateer. In view of the fact that our privateer captured this boat while this country was at war with England, it is clear that the British captors were completely ousted of all title and the vessel, after salvage was paid, was properly restored to the French owner, in accordance with our statute to that effect.

The appellees further state that the *Josefa Segunda*, 5 Wheat., 338, is not in point because it did not involve a question of international law. It is true that this case did not involve a question of breach of neutrality, but it did involve a fundamental question of international law, namely, the title of a sovereign country over its own property in its military possession, and the Court held that in this circumstance a neutral court could not interfere, except for some reason inherent in the capture. This clearly appears from the opinion of the Court quoted on page 27 of our main brief.

The appellees in their Supplemental Briefs, on pages 5 to 7 in No. 722 and pages 4 and 5 in No. 650, discuss questions of the Roman civil law. They have confused public and civil law; they have referred to the doctrine of the Roman civil law concerning the acquisition of private property—clearly not applicable in international law to relations between sovereign states. (Halleck, *International Law*, Vol. 2, page 538.)

The case of *Wheelwright vs. De Peyster*, 1 Johns. (N. Y.), 471, referred to by counsel for

the appellees in their letter of January 20, 1917, to the Clerk of this Court, does not bear upon the question at issue. This was the case of a sale in a neutral country of neutral property, prior to condemnation, where title does not pass until after condemnation. It clearly does not bear upon the case of the Appam, an enemy vessel captured on the high seas by an enemy man-of-war.

#### THE TREATY.

On pages 18 to 21 of their Supplemental Brief, in No. 650, the appellees discuss the treaty. Upon argument, they characterized it as "an obsolescent treaty." They have failed to recognize that this treaty has been continued from year to year since 1840, and that at any time during the last seventy-six years this treaty could have been terminated by giving the notice provided for in the treaty. They argue that our experiences with citizen Genet were such as to prevent us from making a treaty similar to the one contended for by the appellants, but they forget that the treaty was signed many years before citizen Genet came to our shores.

In the Supplemental Brief, in No. 722, page 19, the appellees state that the treaty is plain and unambiguous; in the Supplemental Brief, in No. 650, page 18, the appellees suggest that if the English text is ambiguous, the French is not.

The construction of the appellees would ascribe a meaning to this treaty which was not within the intention or the purpose of the Commissioners who negotiated this treaty on behalf of this country. In the opinion of Elihu Root, Henry Cabot Lodge and George Turner, reported in Senate Documents 162, 58th Congress, Second Session, Vol. 1, page 53, the following occurs:



"We are not at liberty to ascribe a meaning to the terms of a treaty which would frustrate the known and proved purpose of the instrument, unless the words used in the instrument are such as to permit of no other construction. Whoever asserts a construction which would produce such a result must show not merely that it is a possible construction, but that it is a necessary construction, and that any other is impossible."

The Supreme Court expressed the same view in the case of *Geofroy v. Riggs*, 133 U. S., 258, where, in order to carry out the plain purpose of the treaty, the term "States of the Union" was held to include the District of Columbia.

In the case of *Moodie v. Amity*, 17 Fed. Cases, page 650, No. 9741, the Court said:

"This case is one of a new impression. The libel admits the capture of the *Amity* on the high seas, by a vessel under the flag of the French Republic. There is no allegation that this vessel has been fitted, or her force increased within the United States, contrary to the laws of neutrality. It is not alleged that the prize was captured within the jurisdictional limits of the United States. *Upon these grounds alone has this Court assumed jurisdiction, in cases of capture by French privateers, where the prizes have been brought infra praesidia of this country. In all other cases the 17th article of the treaty with France is conclusive upon the subject of their prizes brought into our ports.*"

This case was after the decision in *Glass vs. The Betsy*. The Court held that the treaty with France was conclusive and, as pointed out in our Main Brief, the treaty with France was the same as the one under discussion with Prussia.

The appellees in their Supplemental Briefs

quote the memorandum of the German Government in reference to the development of modern cruised warfare.

It seems clear to us that the Prize Master, a duly commissioned officer in the German Navy, represented the captor vessel. Further suffice it to say that this country for over fifty years in the Bergen prize cases contended for the proposition that prizes could go into neutral ports without convoy and the prizes which went into Bergen sailed there in charge of prize crews without convoy.

On pages 19 to 21 the appellees in their Supplemental Brief, in No. 650, cite various treaties of the United States. In the main the language in each one of them is substantially the same and shows the desire on the part of this government in those times to secure a harbor and a haven where they could not only send prizes, but sell them.

The Swedish treaty, however, is most interesting. The appellees, on page 18 of their Supplemental Brief, in No. 650, cite this Swedish treaty as giving greater privileges than those expressed in the Prussian treaty. The English text of the Swedish treaty appears on pages 20 and 21 of that brief and clearly shows that the prizes could depart with all liberty to the place pointed out in the commissions of the Prize Masters, "which the captains of the said vessels shall be obliged to show." The French text of the Swedish treaty, after referring to the entrance of the prize, is:

"Sans que ces prises, entrant dans les dits ports, puissent être arrêtées ou saisis, ni que les officiers des lieux puissent prendre connaissance de la validité de dites prises, lesquelles pourront sortir et être conduites

franchement et en toute liberté aux lieux portés par les commissions, dont les capitaines des dits vaisseaux seront obligés de faire montre."

"Des dits vaisseaux" clearly appears in the English text to be the "said prizes," and not the men-of-war, and is a further indication of the correct construction of these same words, in the Prussian treaty referred to in appellant's Reply Brief, page 12.

#### THE CARGO.

On pages 12 to 15, the appellees in the *Cargo* case (No. 722), in their Supplemental Brief, argue that even if the *Hull* case (No. 650) is decided against the libellants, the cargo should not follow the same disposition. This is an argument which has never before been raised in this case. It was not argued below in the District Court; it was not argued in their main brief, in which libellants in the *Cargo* case joined; and it was not advanced upon oral argument. It has first appeared in this Supplemental Brief, in No. 722, of which counsel for the appellants learned the day after the argument.

The contention of the appellees is that there might be a neutral interest, but this question is completely disposed of by the case of the *Carlos F. Roses*, 177 U. S., 655. In that case Mr. Chief Justice Fuller, l. c. 661, stated:

"As the vessel was an enemy vessel, the presumption was that the cargo was the enemy's property, and this could only be overcome by clear and positive evidence to the contrary. The burden of proving ownership rested on the claimants."

The claimants in that case were neutrals who

claimed the cargo. The Court held that they were not entitled to the cargo.

The appellees must prove neutral ownership; they can not assume it. Is it not obvious that if there was the slightest possibility of proving neutral ownership, testimony to that effect would have been adduced upon the trial of this case in the court below? But the testimony is absolutely silent concerning the ownership of the cargo. The case below and the cases here is the capture of a cargo upon an enemy ship. The owners of that cargo are bound by the presumption that being upon an enemy ship, captured in war as an act of war, the cargo is enemy-owned. The test is whether the vessel is a British vessel, and when that was found, as is here conceded, the cargo is in the same status of being British-owned.

The libel was filed in behalf of all the owners by the Master as bailee. But how could the Master be bailee? A bailee must be in possession. The possession of this British master of this British vessel was divested on January 15th, 1916, and he has not been in possession of that cargo since that date. This question is raised by the pleadings in paragraph "First" of the answer (Record 722, p. 6). Lieut. Berg, the Prize Master, claimed this cargo as Master of the prize ship Appam and, as such, as bailee of the said cargo (Record 722, p. 5).

The argument that there was no intention to seize the cargo is hardly borne out by the facts. The appellees suggest that because the captor said, "I am sorry, Captain, but I must take your ship," he meant only to take the ship and to make the prize owners a present of their cargo

and for that reason carried it thousands of miles. Do the appellees argue that the provisions and appointments of the vessel were not taken because the captors failed to say, "I am very sorry, Captain, I must take your ship, your provisions and your supplies?" Obviously this is an absurdity, but this is the extent to which the argument of the appellees must go if it is sound. The seizure of an enemy vessel by a man-of-war seizes the vessel and its cargo. The fact that they did seize a part of the cargo, namely, the specie, and removed that from the vessel, is met by the appellees by the suggestion that possibly they meant to take the specie, but not the rest of the cargo because they state specie was contraband. Enemy cargo on an enemy ship is all subject to seizure and no question of contraband intervenes. They seized the specie and took it off the Appam; they seized the rest of the cargo and took it into Hampton Roads.

Respectfully submitted,

JOHN W. CLIFTON,

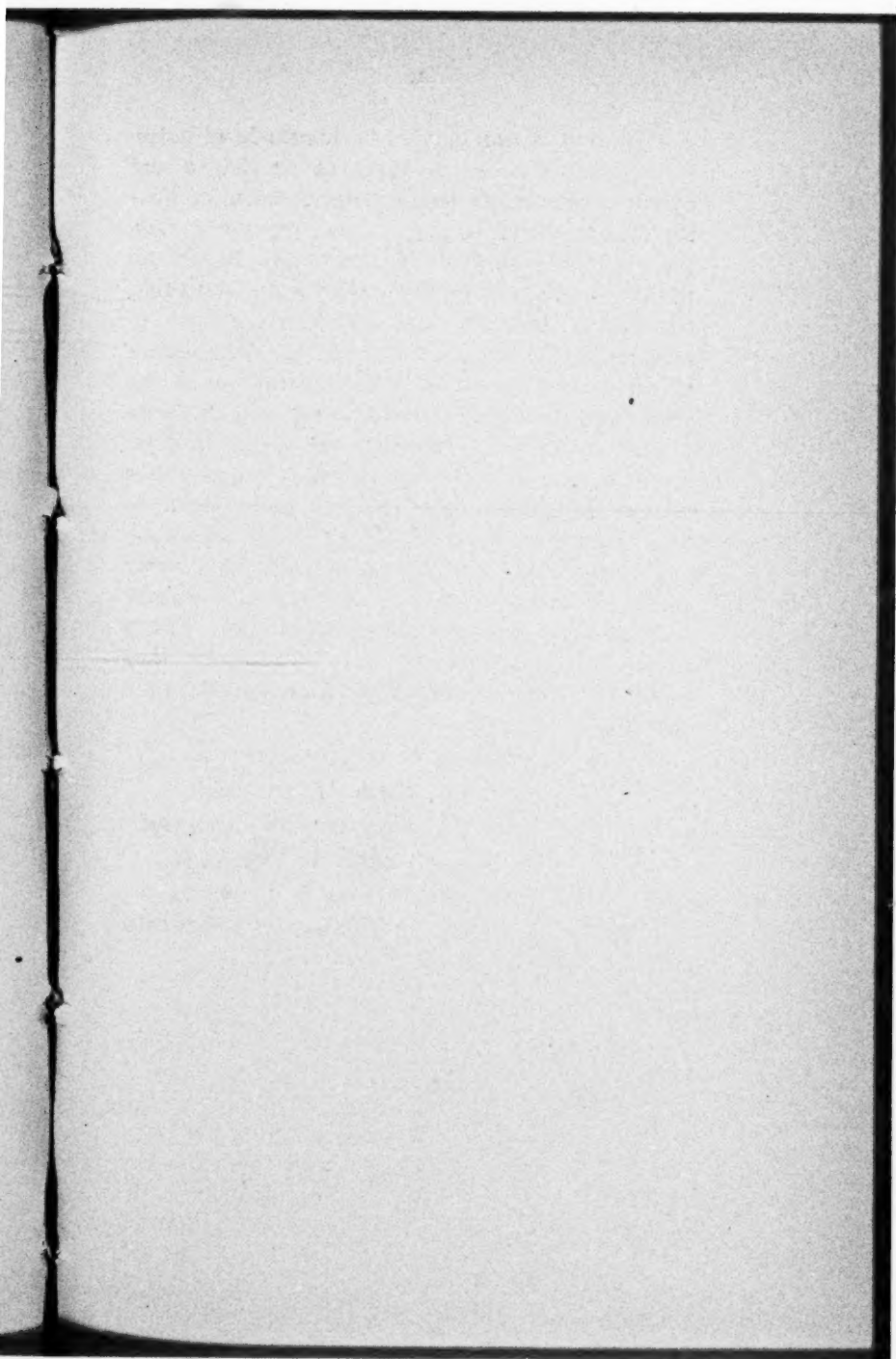
FREDERICK W. LEHMANN,

NORVIN R. LINDHEIM,

WALTER S. PENFIELD,

Counsel for Appellants







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JAMES D. MAHER  
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 680

HANS BERG, PRIZE MASTER IN CHARGE OF THE  
PRIZE SHIP APPAM, AND L. M. VON SCHILLING,  
VICE CONSUL OF THE GERMAN EMPIRE,  
*Appellants,*

vs.

BRITISH AND AFRICAN STEAM NAVIGATION  
COMPANY, LTD.,

No. 722

HANS BERG, PRIZE MASTER IN CHARGE OF THE  
PRIZE SHIP APPAM, AND L. M. VON SCHILLING,  
VICE CONSUL OF THE GERMAN EMPIRE,  
*Appellants,*

vs.

HENRY G. HARRISON, MASTER OF THE STEAMSHIP  
APPAM,

BRIEF FOR APPELLEES

FREDERIC E. COUDERT  
HOWARD TRAYER KINGSBURY  
JAMES K. SYMMERS  
HERBERT BARRY  
FLOYD HUGHES  
RALPH JAMES M. BULLOWA

*Counsel for Appellees.*

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1916.

HANS BERG, Prize Master in Charge  
of the Prize Ship "APPAM" and  
L. M. VON SCHILLING, Vice Consul  
of the German Empire,  
Appellants,

vs.

No. 650.

BRITISH & AFRICAN STEAM NAVIGA-  
TION COMPANY, LIMITED.

HANS BERG, Prize Master in Charge  
of the Prize Ship "APPAM" and  
L. M. VON SCHILLING, Vice Consul  
of the German Empire.  
Appellants,

vs.

No. 722.

HENRY G. HARRISON, Master of the  
Steamship "APPAM."

**BRIEF FOR APPELLEES.**

**Statement of Facts.**

The statement of facts, pleadings and proceedings contained in the appellants' brief is in the main correct, but it makes little or no reference to No. 722 (the cargo case) and is in certain other respects incomplete or inadequate. A brief but consecutive restatement of the whole matter

is accordingly requisite for a proper presentation of the questions at issue.

These are appeals taken direct to this Court from the District Court on the ground that the construction of a treaty is involved. No. 650 is a suit in admiralty brought by the British & African Steam Navigation Company, Limited, the owner of the British steamship *Appam*, to recover possession thereof. No. 722 is also a suit in Admiralty, brought by the Master of the vessel to recover possession of the cargo. The present appellants appeared as claimants in both cases. The two suits were tried together, and a decree was rendered in each awarding possession to the respective libellants. From these decrees the present appeals were taken.

The facts are comparatively simple and appear for the most part in the findings embodied in the opinion of the Court below (Rec. No. 650, pp. 76-79\*). There is no conflict of evidence on any point, and the Appellants recognize that the Court "found the essential facts as they were" (Appellants' Brief, p. 42).

The *Appam* is a British passenger and cargo steamship principally engaged since she was built in 1913 in commerce between Liverpool and the West Coast of Africa. She had been used for a short time as a transport but had been in the "ordinary service" of her owners for "over twelve months" before the capture, and was at that time "purely a merchant ship" (Rec., pp. 28, 29). On January 15th, 1916, she was captured in Latitude 33° 10' N., Longitude 14° 24' West, by the German Cruiser *Möwe*, Great Britain and Germany being then and still at war (Rec., p. 76). She had on board a general cargo, sixteen boxes of specie, and 170 passengers, of whom twenty-two were German, eight of them being military prisoners of the British Government, on their way to England as Government passengers.

The *Möwe* stopped the *Appam* by firing a shot across

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\*The references to the Record are to No. 650, unless otherwise stated.

her bows, and then sent an armed crew aboard with bombs, which were slung over her bow and stern. The officers and crew of the *Appam*, except the engine-room force and the second officer, were taken aboard the *Möwe* and kept there in confinement below decks until January 17th, when they were sent back aboard the *Appam*, together with about 150 other persons taken by the *Möwe* from other vessels previously sunk.

The *Möwe* had "a lot of prisoners" aboard (Rec., p. 58) and it is evident that one purpose of capturing the *Appam* and sending her off across the Atlantic to an American port was to get rid of these prisoners and set the *Möwe* free to continue her career of devastation without impediment and without the speedy discovery of her whereabouts which would have followed had the *Appam* been sent to a nearby port. She could not have been sunk because the *Möwe* was already loaded to capacity and there was apparently no other way to provide for the *Appam*'s passengers short of drowning them. It would take two weeks for the *Appam* to reach America. Meanwhile the *Möwe* could ravage the seas, unhindered and undiscovered.

The Chief Engineer of the *Appam* and her own engine-room force were required to operate the engines, the German officers threatening to blow out the brains of the engineer and to blow up the ship in the event of disobedience. Bombs were placed for this purpose in the engine room, on the bridge, in the chart room and elsewhere. The specie was removed and taken on board the *Möwe*. The appellant Berg, with a crew of twenty-two men, was placed in charge of the *Appam* with written instructions from the commander of the *Möwe* to bring the *Appam* "into the nearest American harbor and there to lay up" (Rec., p. 62). At this time the *Appam* was 130 miles from the Madeiras, the nearest port, 1590 miles from Emden, the nearest German port, 1450 miles from Liverpool, her home port to which she was bound, and 3051 miles from Hampton Roads, the port to which she was sent "to lay up."

For two days following the capture, the *Appam* remained near the *Möwe* and then started westward, continuing on a westerly course until she arrived at the Virginia Capes on January 31st. There is no claim or suggestion that this course was dictated by stress of weather or scarcity of coal or provisions. It must have been selected in order to keep the facts secret as long as possible, and to escape the recapture which was imminent, if not inevitable, if any attempt were made to take her to Emden. She was navigated by Berg and the German crew; the former German prisoners (except two who went on board the *Möwe*) acted as lookouts and armed guards; her own crew kept the decks clean and her own engine room force operated the engines under duress. The prize crew was "insufficient of itself to operate the ship" (Appellants' Brief, p. 22 and see Rec., p. 29). Berg himself was a lieutenant of the German Naval Reserve (Rec., p. 67), but it does not appear what were the qualifications of any of his crew.

On February 1st, 1916, the *Appam* was brought to anchor in Hampton Roads. It was necessary to invoke the assistance of her own crew for this purpose (Rec., p. 23). Berg reported his arrival to the Collector and filed with him a copy of his instructions to bring the *Appam* "into the nearest American harbor and there to lay up" (Rec., p. 62). On the following day, the German Ambassador informed the State Department of Berg's intention to remain in American waters and made the startling request that certain of the British passengers transferred from the *Möwe* to the *Appam* and the crew of the *Appam* herself should be interned in the United States during the remainder of the war (Rec., p. 17). This extraordinary application was promptly denied and the prisoners were released by order of the United States authorities (Rec., p. 19). There was no suggestion that the *Appam* was unseaworthy or short of provisions or was driven in by stress of weather and no request was made for an opportunity to make repairs or obtain provisions. A survey made by order of the Court



on April 14, 1916, showed affirmatively that the vessel was seaworthy and needed no substantial repairs (Rec., pp. 12, 13).

No offer or attempt to depart was made, and in fact Berg and his crew of twenty-two could not navigate and work the ship, nor could the crew be augmented to adequate numbers without a manifest violation of neutrality and of the criminal statutes of the United States, by organizing a military expedition to take home the spoils of war.

After waiting two weeks, thus giving Berg and his crew full opportunity to depart with their prize, if able and willing to do so, the owners of the *Appam* filed their libel on February 16th, 1916. On March 13th, 1916, a libel was filed against the cargo by the Master of the vessel.

By the pleadings as finally amended it was alleged on behalf of the libellants that the holding and detaining of the *Appam* in an American port was a violation of the neutrality of the United States. It was claimed by the respondents that the *Appam* was brought in as a prize by Berg, as Prize Master, relying on the Treaty of 1799 between the United States and Prussia; that the length of his stay was not a matter for determination by a judicial tribunal of the United States; that proceedings were pending in a German Court for condemnation of the vessel and her cargo as prize of war; and that the American Court had no jurisdiction.

The German Ambassador also requested the State Department to ask the Attorney General to instruct the local United States Attorney to appear before the Court and secure the dismissal of the libel. The Secretary of State replied that the question of jurisdiction was one for the Court to decide, but as a matter of courtesy requested the Attorney General to instruct the United States Attorney to present to the Court a copy of the Ambassador's note, which was accordingly done (Rec., pp. 19, 5-7). The Secretary of State also informed the German Ambassador that "in the opinion

of the Government of the United States \* \* \* the case of the *Appam* does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while *en route* to the places named in the commander's commission, but not the deposit of the spoils of war in an American port." (See Note of Secretary Lansing of March 2, 1916, Rec. p. 19.)

In a later communication to the German Ambassador, the Secretary of State again refused to interfere with the Court proceedings. He provisionally agreed to arbitrate the question of the status and rights of the *Appam*, but only upon condition that, *if the libel should be dismissed*, the *Appam* should depart from the territorial jurisdiction of the United States "after she has had a reasonable time to take on board such supplies as may be necessary in the judgment of this Government for a voyage to the nearest port subject to the sovereignty of Germany; and *failing this that she be released* and the prize master and crew be interned for the remainder of the war" (Rec., p. 24). It was proved on the trial that the *Appam* could have been coaled and provisioned at Newport News inside of forty-eight hours for a long voyage (*Id.*, p. 60).

In the cargo case the perishable portion of the cargo was sold by order of the Court for upwards of \$600,000 and the proceeds deposited in the Registry (Rec. No. 722, p. 33). In the hull case the vessel herself was appraised at \$1,250,000 (Rec. No. 650, p. 94).

The two cases were tried together in May, 1916. No witnesses were called by the respondents, although "Berg was present in Court during the entire trial" (Rec., p. 79) and the testimony of libellants' witnesses was thus wholly uncontradicted.

On July 29th, 1916, the Court handed down an elaborate opinion, sustaining the libels, and holding that under the circumstances as shown the *Appam* had no right to come into or remain in American waters; that her coming and her presence constituted violations of

American neutrality; that she could not leave without augmenting her crew and could not augment her crew without further violating American neutrality; that this condition was equivalent to abandonment; that the capture, the flight to an American port (twice the distance to the nearest German port) and the entry into such port to escape recapture was "one continuous occurrence," constituting a violation of neutrality; that the Prussian Treaty of 1799 did not apply and had been correctly so construed by the State Department; and that the pendency of prize proceedings in a German Court was immaterial (Rec., p. 93).

Restitution of both ship and cargo was awarded, and decrees were entered accordingly. In the hull case (No. 650) an appeal was taken and allowed immediately in open Court and the execution of the decree was stayed pending the appeal upon appellants giving a supersedeas bond in the sum of \$2,000,000. The vessel was retained in the custody of the Court below, subject to all orders thereof "looking to her proper care and preservation" (Rec., p. 95). Prior to the signing of the decree the libellant asked for the delivery of the vessel and offered to give such bond as the Court should require, but this application was denied (*Id.*, p. 95). The vessel remains in the legal custody of the Court but with Berg and his German crew still on board. Her safety is assured only by the appeal bond and the German Ambassador's representations to the State Department that "no attempt to run the vessel (the *Appam*) away will be made so long as the said ship remains under the custody of said Court" (Rec., p. 7)—a *chose* in action, and a "scrap of paper"—poor substitutes for the vessel herself.

Execution of the decree in the cargo case was also stayed upon appellants giving security in the sum of \$30,000. The proceeds of the sale of part of the cargo are still in the Registry of the Court and the unsold portion is in the custody of the Marshal (Rec. No. 722, p. 35).

The appeal in the hull case was taken on August 8, 1916, and in the cargo case on September 28th, 1916. The Records were filed in this Court on September 5th and October 14th respectively. As the appellants did not move to advance the appeals for argument such motions were made by the appellees and the two causes have been set down together for January 8th, 1917.

### **The Questions at Issue.**

The appellants' brief argues at some length various questions which are not involved in this case, especially in connection with the technical validity of the original capture, and undertakes to demonstrate certain undisputed propositions, as, for example, that the jurisdiction of prize causes is vested exclusively in the Courts of the captor's government, and that the mere entry of a prize into neutral waters is not necessarily a breach of neutrality.

The question here is not "prize or no prize"; these suits were brought on the *instance* side of the Court; the question is simply whether there should be restitution for a violation of neutrality subsequent to the actual capture.

The arguments of appellants on this question reduce themselves in effect to the following:

A.—That the only violation of neutrality for which the Courts of a neutral country can restore a prize is one inherent in the captor's character or in the capture itself, and that no subsequent violation of neutrality can be considered.

B.—That by the capture, the title to the *Appam* vested in the German Government, and she thereby became a public vessel of the German Empire and hence exempt from the jurisdiction of our Courts.

C.—That under the Prussian treaty the *Appam* had a right to come into an American port alone and not under

convoy and "there to lay up" indefinitely or during the war.

D.—That in any event she had a right to stay until ordered to leave, and did not violate neutrality meanwhile.

E.—That the Hague Convention (XIII) has no bearing on the case.

### **Brief of the Argument.**

The appellees' answer to appellants' contentions may be summarized as follows:

1. Prizes may be brought into a neutral American port only on account of unseaworthiness, stress of weather or lack of fuel or provisions.

2. If they enter under other circumstances or remain after the necessity therefor has passed they violate American neutrality.

3. Articles 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of accepted international law on this subject, and embody the American practice as shown by our history and our jurisprudence.

4. The rejection by the United States of Article 23 was notice to the world that this country would not permit the sequestration of prizes in American ports, or their entry therein, except as allowed by Article 21.

5. Where a prize is brought into a neutral American port, the admiralty courts may take jurisdiction of a suit on behalf of the owners, and award restitution if there has been a violation of neutrality in connection therewith, whether inherent in the capture or prior or subsequent thereto.



6. The Prussian Treaty of 1799 (Art. XIX) as continued by the Treaty of 1828, does not prevent the application of these general rules of international law.

a. It relates only to sending in prizes under convoy of a war vessel.

b. It does not permit an indefinite stay in an American port, but contemplates a timely departure to the destination named in the commission of the captor vessel's commander.

c. If construed and applied in this case as appellants contend, it would involve a violation of the neutrality of the United States towards Great Britain.

7. Full title to a prize, whether neutral or belligerent, does not vest until the prize has been brought into a port subject to the captor's sovereignty and duly condemned in a proper judicial proceeding. Meanwhile, the prize may be lost by recapture, abandonment or violation of neutrality; these are necessary incidents to the *status* "prize."

8. Until condemnation, or other express conversion, a prize remains in a separate category, and does not become a public vessel exempt from neutral jurisdiction.

9. Sending a prize into a neutral port with a prize crew insufficient to navigate her safely, and for the express purpose of laying up, is equivalent to an abandonment as well as a violation of neutrality.

10. A violation of neutrality sufficient to require restitution by the courts of a neutral nation may be of neutrality as defined in express statutes or as recognized in international law; as for instance by a capture in neutral waters or by an illegally augmented crew, or by an attempt to use a neutral harbor as a place of depot for the spoil of war, or in any other way as an aid to belligerent operations.

## POINT I.

It is the general rule of International Law that prizes may not be sequestered in a neutral port pending condemnation proceedings in the Courts of the captor's country. Unless expressly excluded, prizes may seek temporary shelter in a neutral port, but not permanent or indefinite asylum.

This rule is the product of a long course of historical development in the various maritime countries.

French ordinances of 1543, 1674 and 1689 forbade all commanders of vessels of war to send or allow to go to foreign countries any of the prizes which they might make. During the 18th century, there were some variations from this rule, but in the French Prize Code of 1784 it was provided that "no prize shall be taken into a foreign port save for absolute necessity." (See Naval War College, International Law Situations, 1908, p. 54; also Appendix to 5 Wheaton, pp. 52-58.)

In 1650, and again in 1681, France prohibited the stay of foreign prizes in her ports for more than 24 hours. (See Pistoye & Duverdy, *Traité des Prises Maritimes*, Vol. 2, p. 449, 452.) This is, perhaps, the origin of the 24 hour limitation for belligerent war vessels in neutral ports.

By an edict of the States General of Holland of November 7, 1658, it was declared:

"That no prize ship should be brought into the port itself, but merely into the outer roads, where she might be *sheltered from danger*, and that nothing should be unladen or sold out of her; and if anyone should act to the contrary, *the prize should be restored to the former owner as though it had never been taken*, and the captor himself should be detained and his own vessel seized and confiscated."

(See note to the *Josefa Segunda*, 5 Wheat., at p. 349, citing Duponceau's Translation of Bynkershoek.)

This is evidently one of the very early expressions of the rule which crystallized 250 years later at the Hague as Article 22 of Convention XIII.

The English authorities recognize the same general rule and treat any departures from it as exceptional and irregular.

In the *Flad Oyen* (1 C. Rob., 135), Lord Stowell explicitly condemned the practice of sequestering and proceeding against prizes in a neutral port:

"It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war within their cities, would be to make their coasts a station of hostility."

The same Judge said in the *Henrick and Maria* (4 C. Rob., 43):

"Upon principle, therefore, it is not to be asserted that a ship brought into a neutral port is with effect proceeded against in the belligerent country. The *res ipsa*, the *corpus*, is not within the possession of the court; and possession, in such cases, founds the jurisdiction."

In *The Polka*, Spinks, Ecclesiastical and Admiralty Reports, 447, Dr. Lushington said:

"The circumstances under which the present application is made are quite peculiar and form an

exception to the general principle upon which this court proceeds. Though there is no direct evidence that the vessels are Russian, yet there is no claim, and the court entertains no doubt upon the subject I have no hesitation in condemning them; and, looking at the fact deposed to, that they are not in a fit state to be brought to England, *and the consent of the Prussian Government to their sale at Memel*, the Court will allow that course in the present case, but with the proviso that the wishes of the Prussian Government shall be fully observed with respect to the sale.

I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captor's country, and the court must guard itself against allowing a precedent to the contrary to be established."

The express consent of the neutral Government was here the controlling factor.

The German Prize Code expressly imposes the same regulations upon German naval commanders:

"III. Bringing in of Prize. The commander provides for bringing the vessel into a German port, or the port of an ally, with all possible despatch and safety. A prize may be brought into a neutral port only if the neutral power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel and supplies. In the latter case she must leave as soon as the cause justifying her entrance ceases to exist.

The commander gives to the officer of the prize crew *the necessary written instructions in regard to*

*the voyage and makes up the crew so as to enable the officer to bring in the vessel."*

German Prize Code, Huberich & King, pp. 64-65.

This provision of the German Prize Code, with certain others, was offered in evidence at the trial, and will be found in the Record at pp. 75, 76. The Trial Court excluded it as evidence, but it is open to this or to any other Court as a legitimate source of information in regard to the officially prescribed practice of Germany on a question of international law.

There is also a striking agreement of opinion among the leading text writers on the subject.

In Wheaton's treatise on Capture, written in 1815, it is said at p. 262:

"Without entering into a discussion of the various opinions that have been thrown out on this subject, better opinion and practice may be stated to have been that a prize should be brought *infra praesidia* of the capturing country, where by being so brought it may be considered as being incorporated into the mass of national stock. The greatest exceptions that have been allowed, have not carried the rule beyond the ports or places of security *belonging to some friend or ally in the war, who has a common interest in defending the acquisitions of the belligerent, made from the common enemy of both.*"

And at p. 263:

"By the regulations of France, foreign ships are forbidden to enter with prizes into the ports of France, except in cases of distress, and they are permitted to stay no longer than this necessity exists. *Valin observes on this article that such a rule is exactly conformable to the laws of neutrality,*



*and Hubner admits that a wise hospitality will not be exercised beyond this."*

In Dana's note to Wheaton on International Law (1866), the rule is admirably stated as follows:

*"The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in case of necessity; and they may remain in the ports only for a meeting of the exigency. The necessity must be one arising from perils of the seas, or in need of repairs for seaworthiness, or provisions and supplies. The neutral will protect the prize against pursuit from the same port for twenty-four hours and against capture within its waters, but beyond that a general peril of war arising from the power or vigilance of the other belligerent does not constitute a necessity which the neutral recognizes as justifying the remaining in his port. This rule, if adhered to, will prevent the arising of a custom of retaining prizes in safety in a neutral port, until they can be condemned in the home port, in their absence. But, apart from any such practice of neutrals, it seems clear, that to allow prizes to fly to a neutral port, and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts in neutral ports. It seems, therefore, to be the tendency, if not the settled rule, now, that a decree of condemnation will not be passed against prizes remaining abroad, unless in case of necessity, or if passed, will not be respected by other nations."*

(Wheaton's Int. Law, 8th Am. Ed., Sec. 391.)

In Hall on International Law, it is said:

*"But it is now usual for the neutral state to restrain belligerents from bringing their prizes*

into its harbors, except in cases of danger or of want of provisions, and then for as short a time as the circumstances of the case will allow." (Int. Law, 5th ed., p. 618.)

Westlake, referring to the practice of condemning prize vessels lying in a neutral port, says that this "seems to be unsound in principle. To be a proper subject of adjudication a prize must have been brought *infra prae-sidia*, which is not the case while she lies in a neutral port in which any forcible control of her ought not to be allowed by the territorial sovereign." (Westlake, International law, Part II, p. 215).

In Risley on the Law of War, the same idea is expressed (p. 176):

"On the whole it seems likely that the practice of excluding the prizes of both sides, except in case of necessity, will be adhered to in future. Such a course is, in fact, almost a necessary corollary of the strict rules which either already regulate or are likely to regulate, the admission of belligerent public vessels other than prizes into neutral waters and ports in time of war."

In an article by Dr. James Brown Scott, published in the American Journal of International Law, January, 1916, pp. 104-112, he says (p. 108):

"In any event, neutrals should not allow their ports to be a depository for the spoils of war."

Bluntschli, the great German authority on international law, in treating of the subject of neutrality and neutral territory, says (International Law, Sec. 778, Note):

"To allow its territory to be used for military operations by one of the belligerents evidently constitutes an illegal aid and assistance. The question has been warmly discussed whether the neutral

state should permit prizes to be provisionally placed in safe-keeping in its ports. The United States had accorded by a treaty this privilege to France at a time anterior to their laws on neutrality. If this act has for its object to afford the vessel shelter from the dangers of the sea, its character is entirely pacific and cannot be looked upon as a violation of neutral duty. *If, on the contrary, the victor brings his prize into a neutral port in order to make her more safe and so that he may fly the more quickly to new conquests, he would be using the neutral territory as a base of operations, which could not be tolerated.* The neutral state should then, in order clearly to indicate its intention to remain neutral, refuse the entry of its ports to all prizes taken by belligerents, *unless there is a question of ships in distress."*

During our own Civil War and in our war with Spain, and again in the Russo-Japanese War in 1904, the neutral nations generally either excluded prizes, or allowed only temporary entrance in cases of necessity.

In the British Foreign Office, June 6th, 1861, Lord John Russell instructed the Admiralty as follows:

"Her Majesty's Government are, as you are aware, desirous of observing the strictest neutrality in the contest which appears to be imminent between the United States and the so-called Confederate States of North America, and with the view more effectually to carry out this principle they propose to interdict the armed ships and also the privateers of both parties *from carrying prizes made by them into the ports, harbors, roadsteads or waters of the United Kingdom, or of any of Her Majesty's colonies or possessions abroad."*

Similar instructions were addressed on the same day to the Secretary of State for India, and the colonies. Circular instructions to Governors of colonies respect-

ing the treatment of prizes captured by Federal or Confederate cruisers if brought into British waters were as follows:

"Downing Street, second of June, 1864. I think it well to communicate to you the decisions at which Her Majesty's Government have arrived on certain questions which have arisen respecting the treatment of prizes captured by Federal or Confederate cruisers if brought into British waters; (1) If any prize captured by ship of war of either of the belligerent powers shall be brought by the captors within Her Majesty's jurisdiction, notice shall be given by the Governor to the captors immediately to depart and remove such prize. (2) A vessel which shall have been actually and *bona fide* converted into and used as a public vessel of war shall not be deemed to be a prize within the meaning of these rules. (3) If any prize shall be brought within Her Majesty's jurisdiction through mere stress of weather or other extreme and unavoidable necessity, the Governor may allow for her removal such time as he may consider to be necessary. (4) If any prize shall not be removed at the time prescribed to the captors by the Governor, the Governor may detain such prize until Her Majesty's pleasure shall be made known. (5) If any prize shall have been captured by any violation of the territory or territorial waters of Her Majesty, the Governor may detain such prize until Her Majesty's pleasure shall be made known. \* \* \* *These rules are for the guidance of the executive authority and are not intended to interfere in any way with the process of any court of justice.*"

Bernard's History of British Neutrality, pages 137-141.

France made a declaration regarding prizes very similar to that issued by Great Britain and the apposite sections read as follows:

"Paris, 10th of June, 1861. The Minister of Foreign Affairs has submitted to the Emperor the following declaration, to which His Majesty has given his approval \* \* \* (1) No ship of war or privateer of either belligerent will be permitted to remain with its prize in our ports or harbors for more than twenty-four hours, save in the case of *relâche forcé*. (2) No sale of goods coming from a prize can take place in our ports or harbors.

NAPOLEON."

The Belgian authorities provided that privateers and their prizes should not be allowed to enter Belgian ports "except in case of imminent perils of the sea" and that the authorities should "compel them to put to sea again as soon as practicable."

The Netherlands made similar provision.

Spain provided in its neutrality proclamation of June 17th, 1861, Article III:

"It is forbidden to vessels of war or privateers with their prizes to enter or to remain for more than twenty-four hours in the ports of the Monarchy, except in case of stress of weather. Whenever this last shall occur, the authorities will keep watch over the vessel and oblige her to go out to sea as soon as possible, without permitting her to take in any stores except those strictly necessary for the moment, but in no case arms or supplies for the war. \* \* \* (4) Articles proceeding from prizes shall not be sold in the ports of the Monarchy."

A similar provision was made by Portugal and the Hawaiian Islands.

Bremen, at that time a free State, provided:

"The Senate finds it necessary in regard to the events which have occurred in North America to



renew the regulations contained in its ordinance of April 29, 1854, and accordingly makes the following notification for general observance \* \* \*.

(2) The proper officers are ordered not on any account to allow the fitting out or provisioning of privateers under whatever flag or carrying any letters of mark in any port of the Bremen territory, nor to admit into Bremen ports any such privateers or the prizes made by them, except in cases of proved stress of weather at sea. Resolved at Bremen in the Assembly of the Senate on the 2nd, published on the 4th of July, 1861.

The free city of Hamburg promulgated a like ordinance.

During the Spanish war of 1898 the Navy Department of the United States issued the following instructions:

"Sending in of prizes. 20. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

24. *The title to property seized as prize changes only by the decision rendered by the prize court.* But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

In 1898 Brazil provided that no war ship of any character should be permitted to enter and remain, with prizes, for more than 24 hours, or be permitted to dispose of its prizes or of articles coming therefrom.

The Dutch West Indies forbade the entry of prizes "except in case of accidents of the sea or want of provisions."

France again proclaimed that no ship of war of

either belligerent "will be permitted to enter and to remain with her prizes in the harbors and anchorages of France, etc., except in case of forced delay or justifiable necessity. No sale of objects gained from prizes shall take place in the said harbors and anchorages."

Great Britain provided that "armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbors, roadsteads, or waters of the United Kingdom."

Italy, which had made a similar proclamation in 1864, repeated it in 1895.

Japan in 1898 proclaimed that no man of war should be permitted to take any captured vessel into the territorial waters of the Empire, except under stress of weather, or on account of disablement or of destitution of articles necessary for navigation. And it was expressly forbidden in the last-mentioned case to dispose of the captured vessel or articles.

The Netherlands and Portugal made a like proclamation in 1898, as did Denmark and Sweden in 1904. (For the foregoing proclamations, etc., see *Naval War College; Int. Law Situations; 1908, pp. 70-73; also Am. Journal of Int. Law, January, 1916, p. 109 et seq.*)

It is thus clear from this review of the acts of modern states that there is an extraordinary consensus of opinion on the subject. It is rare to find such unanimity upon any international question as is found in that relating to asylum for prizes in neutral ports. As international law must ultimately be founded upon the consent of nations, this universality of practice furnishes the very best evidence to sustain our position that the law of nations generally forbids a prize to be sent into a neutral port to be detained there during the continuance of the war. All these proclamations are predicated upon the necessity of maintaining a strict neutrality, and the fundamental basis of neutrality would be violated were it possible for a belligerent to use neutral ports as an asylum for its prizes.

Had the German authorities sent a hundred prizes instead of one into Newport News, it would have been evident that they were using that harbor as a real base of operations. Permission so to use it on the part of the Government of the United States would constitute a very real breach of neutrality and violate our treaties, as well as our law. In principle, of course, the case is not otherwise where only one or two vessels are sent in. Should our courts take the contrary view some U-53 might soon fill New York Harbor with British and neutral prizes.

## POINT II.

The provisions of Articles 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of the existing law of nations. The express refusal of the United States to accede to Article 23 was notice to the world that this country would not allow the sequestration of prizes in our ports.

On October 18, 1907, at The Hague was signed Convention XIII, concerning the rights and duties of neutral powers in naval war.

Scott's Hague Conventions and Declarations, p. 208.

When ratified by our Treaty Making Power it became part of our law. It was law for us on August 1, 1914. *It is the measure of our duties to-day*, although Article 28 may preclude the belligerents from invoking its clauses as conferring specific *treaty* rights, because some of the other present belligerents were not parties thereto.

An examination of this whole Convention further indicates that it is in effect declaratory of the generally existing usage of modern times. The underlying object of the Convention was to prevent the use of neutral harbors as in any way furnishing a base for warlike operations. The Convention recites in its preamble:

"in cases not covered by the present Convention, it is expedient to take into consideration the general principles of the law of nations;"

• • • • •

"the Powers should issue detailed enactments to regulate the results of the attitude of neutrality;"

• • • • •

"it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;"

• • • • •

"these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except in case where experience has shown the necessity for such change for the protection of the rights of that Power."

In regard to the violation of territorial waters, Article 3 provides:

"When a ship has been captured in the territorial waters of a neutral Power, this Power must employ . . . the means at its disposal to release the prize with its officers and crew, and to intern the prize crew."

Article 5 provides that

"Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries."

Article 9 enjoins impartiality between the belligerents. Belligerent warships may not remain in the ports of a neutral Power for more than twenty-four hours (Article 12).

Article 14 provides that

"A belligerent warship may not prolong its stay in a neutral port beyond the permissible time except

on account of damages or stress of weather. *It must depart as soon as the cause of the delay is at an end.*"

It is thus evident that no request to depart is necessary to be given by the neutral government, but that if the vessel does not depart of itself, when the time limit is up, it remains in violation of the law.

Article 17 provides that the repairs to belligerent warships must be only such as are

"absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay."

It is also provided that the revictualing of the vessels may also only be up to such extent as to bring their supplies up to the peace standard and that only sufficient fuel may be taken on to enable them to reach the nearest port in their own country (Art. 19).

The following articles apply specifically to prizes:

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Article 22. *A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.*

Article 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under con-



voy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty."

Articles 21 and 22 were ratified and adhered to by Belgium, France, Austria-Hungary, Germany, the United States, and a number of others, and signed but not ratified by Great Britain. It is significant that as to Article 23 reservation was made by Great Britain and the United States, as also by Japan and Siam. The German Prize Code embodies Articles 21 and 22 *in ipso* *simis verbis*, but makes no mention of the permissive innovation contained in Article 23.

The act of adhesion of the United States contains the following reservation (Scott, *Id.* p. 219):

"That the United States adheres to the said Convention, subject to the reservation and *exclusion of its Article 23* and with the understanding that the last clause of Article 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." (See also 36 U. S. Stat. Pt. II, p. 2438.)

The policy of the United States, as well as that of Great Britain, is clearly shown by Articles 21 and 22 which were signed, adhered to or ratified by forty-three of the Powers. This is indicative of the very general agreement among the nations that these articles declared existing international law. The German Prize Code is equally convincing.

Article 23 is evidently inconsistent with Articles 21 and 22 and contrary to the general rule of neutrality and the modern practice developed by the nations. The

attitude of the United States in its reservation indicates its disavowal of the proposed innovation.

It is to be noted, however, that even if Article 23 were law, it would not allow the *Appam* to remain in the ports of the United States unless our Government permitted this to be done by some positive action, nor would permission in specific cases be sufficient.

Article 23, taken in connection with the whole of the Convention, merely provides that a neutral nation, at or before the outbreak of the war, may permit that its ports be so used, and that, where such permission has by law been given, such use of its ports will not be considered a violation of neutrality.

The United States was evidently unwilling to admit the *right* of a neutral to *permit* its ports to be so used. This innovation the delegates voted against and the Senate rejected. We are now told by the appellants that it is our law and that our Government has opened our ports as an asylum for prizes—Where and how?

The "order to leave" mentioned in Article 21 refers to vessels driven in by *vis major*; it has no application to the case of a vessel sent to "lay up" in a neutral port, whose very *coming in was unlawful*.

The illegality involving release foreseen in Art. 21 begins when the vessel is in condition to depart; that aimed at in Art. 22 is the initial illegality involved in coming in. The *Appam's* entry into Hampton Roads was not caused by the weather, but by the orders of the German commander of the *Möwe* given two weeks before. The distinction is capital and vitiates the ingenious argument of appellant that the *Appam* was not outlaw merely because she came "over the line."

Dr. Scott in his work on the Peace Conferences of 1899-1907, fully explains the point of view of the United States as to Convention XIII, and gives the entire text of the Report of the American Delegates, of whom he was one. In this Report it is stated:

"It was constantly borne in mind by the delega-

tion, in all deliberations in committee, that the United States is, and always has been, a permanently neutral power, and has always endeavored to secure the greatest enlargement of neutral privileges and immunities. \* \* \* The delegation of the United States gave constant support to the view that stipulations having for that purpose the definition of the rights and duties of neutrals should, as a rule, take the form of restrictions and prohibitions upon the belligerents, and should not, save in case of necessity, charge neutrals with the performance of specific duties." (Vol. II., pp. 237, 238.)

Again referring to the Articles of the Convention as to belligerent prizes in neutral waters, the American Delegates reported:

"Articles 21 to 25 relate to the admission of prizes to neutral ports. Articles 21 and 22 seem to be unobjectional. Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. *This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse and should not be approved.* In this connection it is proper to note that a proposition absolutely forbidding the destruction of a neutral prize, which was vigorously supported by England and the United States, failed of adoption. Had the proposition been adopted, there would have been some reason for authorizing such an asylum to be afforded in the case of neutral prizes." (*Id.* Vol. II, p. 240.)

The Report further says:

"The second paragraph of Article 3 and Article 23 should not be approved." (*Id.* Vol. II, p. 241.)

The Report continues:

"A careful examination of the Convention as a whole and in all its parts leads to the conclusion that its ratification is in the interest of neutral Powers, but that in such ratification it is suggested that the second paragraph of Article 3 and Article 23 be rejected." (*Id.* Vol. II, p. 242.)

On April 17th, 1908, the Senate of the United States, in Executive session, advised and consented to the ratification of the Convention:

*"reserving and excluding, however, Article 23 thereof, which is in the following words:*

'A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

'If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

'If the prize is not under convoy, the prize crew are left at liberty." (*Id.* Vol. II, p. 523.)

Dr. Scott, who may be regarded as in effect the official historian for the United States of the Conference of 1907, says, in discussing the rights and duties of neutral nations in connection with the various articles of the Convention, Vol. I, p. 644, *et seq.*:

"The neutral does not look with favor upon the entry of prize within its jurisdiction, and while Article 21 of the convention does not in express words permit the prize to enter freely, it recognizes that 'unseaworthiness, stress of weather or want of fuel or provisions,' may justify entrance. The reason for this is simple, namely, that an entry in such a case cannot be considered as the result of design or premeditation. *It is in its nature accidental and necessary. However, the neutral port must not be*

*made a port of entry for prize, and the prize entered must not remain permanently, otherwise, the neutral port becomes a basis of hostile operations.* Therefore, the prize must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew (Article 21).

The reason for this action is simple. The prize was only permitted to enter by reason of the existence of certain circumstances. The moment these cease to exist the presence of the prize is unlawful. In the language of law, it is a trespasser and is treated accordingly.

In the absence of what may be called attenuating circumstances, namely, unseaworthiness, stress of weather or want of fuel or provisions, *the prize cannot enter neutral jurisdiction. If it does, it violates neutrality* and the express provision of Article 22 which requires that a neutral power must release the prize brought into one of its ports under any other circumstances than those just specified.

The provisions of Article 23 are seemingly at variance with the two previous articles; for a neutral power is authorized to allow prizes to enter its ports and roadsteads with or without convoy, to await the decision of a Prize Court of the captor country. The advisability of this provision is questionable. If a belligerent cannot conduct the prize to its home country, the prize should be released. A neutral port should not be used as a substitute. Whatever language be used, the fact remains that *the neutral port serving as a basis of hostile operations for the capture of a prize commits a hostile act, and the storing of a prize in a neutral port is in aid of a hostile act."*



Dr. Scott also says:

"The older practice found the essence of neutrality to consist in extending an equal right to both belligerents; the modern doctrine insists that the neutral shall no longer suffer; it must prevent a hostile act by either belligerent within its territory. It is not a party to the war, it cannot be made to render assistance or its territory used without becoming a party.

It therefore follows that capture by either belligerent within neutral waters is not only a violation of neutral sovereignty but of neutrality as well, because, if permitted, neutral territory is at once made the basis of hostile action." (p. 622.)

He then discusses the whole subject, together with the injustice that may be done to a weak nation which dare not protest against captures, and he rehearses the American precedents beginning with the capture of the *General Armstrong* in 1812.

He cites Commodore Stewart's case (1 Ct. Cl., 113) in the Court of Claims (1864). He also cites with approval the language of Sir William Scott, to wit:

"When the capture within the neutral territory is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy."

*The Vrouw Anna Catharina*, 5 Rob. 15 (1803).

Also the cases found in

Moore's International Law Digest, Vol. 1, 366,  
Vol. VII, 937.

Also

Hershey's Int. Law and Diplomacy of the  
Russo-Japanese War, pp. 258-263.

In a very recent article in the American Journal of International Law Dr. Scott says: "In adhering to the convention the United States accepted Articles 21 and 22, but specifically excluded Article 23. In so doing it declared its attitude, and the deposit of the instrument of adherence at The Hague in accordance with the terms of the treaty was *notice to the world of its attitude in the matter of prize.*" (Am. Journal of Int. Law, Oct., 1916, p. 818.)

Mr. Charles C. Hyde discusses the various articles of Convention XIII in the Journal of International Law for July, 1908, at a time when the judgment of publicists was not swayed as it may well be to-day by the war. Speaking of Art. 21, he says:

"It is well that there was embodied in the last paragraph of Article 21, the provision charging the neutral in such case with the duty not merely to order departure, but also in case of necessity to employ all available means to release the prize with its officers and crew and to intern the prize crew. That the performance of such a duty is but an exercise of right possessed by the neutral is not to be doubted."

Admiral Stockton in his Outline of International Law (1914), referring to the policy of the United States and the action of our delegates at the Hague Convention, says:

"The refusal to allow the above aid (asylum) to a belligerent as to prizes in war time is in accordance with the impartial position of the United States as a neutral power and in accordance with British usage. It would enable the belligerent cruiser to carry on operations without the inconvenience of sending prizes to home ports." (p. 408.)

The Admiral, in speaking of capture in neutral waters cites Article 3 of Convention XII of the second Hague

Conference, ratified by the United States, which provides that judgments can be brought before the international prize court in case of an enemy's ship captured in the territorial waters of a neutral power when that power has not made the capture the subject of a diplomatic claim. In referring to the case of the *Sir William Peel*, 5 Wall. 517, where it was held that unless the nation in whose territorial waters the capture had been made appeared, the courts of the United States would not consider such violation of neutrality ground for restitution, he points out that the International Commission to which this case was finally referred took a view directly contrary to that of the Supreme Court of the United States. The award of the Commission was made upon the ground "that the capture within neutral waters of Mexico was absolutely illegal and void." (*Id.* pp. 400, 401.)

An examination of the discussions as to Article 23 in the Proceedings of the Hague Convention indicates that the article was debated and decided upon as a compromise measure. It was debated mainly in connection with the question of the destruction of prizes. The article was proposed by the Italian Delegation with the expectation that its adoption might offer a way out for those who maintain the right to destroy neutral prizes in certain cases of necessity. The significance of the discussion is that while all agreed on 21 and 22 as expressing existing law, Article 23 was debated as an innovation, and from the standpoint of policy. These debates disclose the fact that Great Britain and the United States stood for the codification of existing International Law as finally embodied in 21 and 22; Germany also acquiesced, proposing to add to the original draft of Article 21 the words: "for lack of provisions or fuel." This amendment was accepted. The German delegation evidently followed the view of their Government as now embodied in their present Prize Code.

The adhesion of the United States to Articles 21 and 22 was clearly no accidental compromise, but was done in pursuance of the fixed policy of this country and that of other nations, as shown by their definitely proclaimed practice, at least since the middle of the 19th century.

As pointed out in Oppenheim on International Law, only by adhering to this practice can neutrality be preserved. He says:

*"It has long been universally recognized that the duty of impartiality must prevent a neutral from permitting a belligerent to set up Prize Courts on neutral territory. The intention of a belligerent in setting up a court on neutral territory can only be to facilitate the plundering by his men-of-war of the commerce of the enemy. A neutral tolerating such Prize Courts would therefore indirectly assist the belligerent in his naval operations."* (Vol. 2, p. 395.)

He explains that since 1793, when M. Genet attempted to organize French Prize Courts in American territory, it had become admitted that such proceedings were unlawful, and therefore, "Article 4 of Convention XIII enacts this formerly customary rule."

*"It would no doubt be an indirect assistance to the naval operations of a belligerent if a neutral allowed him to organize on neutral territory the safe-keeping of prizes or their sale."* (p. 396.)

Oppenheim therefore approves Art. 21 and 22 of Hague Convention XIII, and says:

*"While the stipulation of Art. 21 cannot meet with any objection, the stipulation of Art. 23 of Convention 13 is of a very doubtful character. . . . This rule actually enables a belligerent to safeguard all his prizes against recapture, and a neutral power which allows belligerent prizes access to its ports under the rule of Art. 23 would indi-*

*rectly render assistance to the naval operations of the belligerent concerned."* (p. 397.)

This "assistance to the naval operations" of Germany is just what the appellants ask in this case.

### POINT III.

The history of the United States neutrality laws and the circumstances attending their origin clearly indicate that both the policy and the law of the United States prohibit the use of American ports as a depot for spoils, by the safe-keeping therein of foreign belligerent prizes.

After the termination of the Revolutionary War and as a consequence of our Treaties with France, two in number, both of 1778, one of Alliance and the other of Amity and Commerce, numerous and protracted difficulties arose in regard to the bringing by French vessels into American ports of prizes which they had taken.

Article XVII of the Treaty of Amity and Commerce is substantially similar to Article XIX of the Prussian Treaty. (See full text in the Appendix.) It was an outcome of the unsettled and undeveloped ideas of neutrality then existing. Moreover, the treaty itself was one made with an ally, the only friend which this country then had and the only ally it ever had. At that time it was permissible to give to one power or another certain privileges available in wartime. In discussing these Treaties it must be remembered that the evolution of the law of neutrality, which has taken place since that time, especially as a consequence of these exclusive privileges given by the United States to France, wholly negatives this ancient view. The fundamental postulate of neutrality to-day is complete impartiality between the belligerents. This rule, embodied in the original statutes of the United States, and since so firmly adhered to, is not founded



upon "bookish theoretic" but is the resultant of painful national experience.

An interesting and graphic description of the difficulties created by M. Genet during his short but agitated stay as Minister from the French Republic is set forth in McMaster's History of the People of the United States, Vol. II. A vivid account is given of the fitting out of privateers in our ports and of their depredations. Genet arranged to have crews enlisted and vessels fitted out in our ports, took prizes, brought them into American ports and there set up prize courts, presided over by a French Consul. He claimed that he had a right to these exceptional privileges, and he argued that the Treaties were all on his side.

"One article gave to the contracting powers the right to bring prizes into each others' ports. Did not this also include the right to condemn and sell them?

Another article, the twenty-second, forbade either party to suffer the enemies of the other to fit out privateers in its waters. Did not this imply the right of either party to fit out privateers in the ports of the other?" (p. 103.)

"The labor of preserving neutrality, however, was nowhere so difficult as at the seat of Government itself. The whole state of Pennsylvania was strongly Republican. The men in authority from the Governor down to the captains and sergeants of the militia companies were firm supporters of Genet. The very courts became corrupt and rendered decisions which the 'Genetines,' as they were nicknamed, received with wild delight. The Ship *William* of Glasgow had come in as a prize of the Citizen Genet. The French Consul condemned her. The British owners libelled her in the Courts, had her placed in charge of the Marshal and brought the case to trial late in June. To the astonishment of the friends of Justice, the Court discharged the

libel, declaring that the matter was one for the politicians to decide and not the judges." (pp. 107, 108.)

Likewise juries acquitted American citizens who had enlisted and served on French privateers, and public opinion dictated and approved these acquittals.

The decisions of the lower Courts to which McMaster refers were those decisions the authority of which was swept away by the Supreme Court in the famous case of *Glass v. The Sloop Betsey* (*infra*).

The following incident illustrates the difficulties caused by Genet in his reliance upon these exclusive Treaty privileges (McMaster, Vol. 2, p. 136):

"An English craft, taken within the waters of the United States, was sent into the port of Boston by a French privateer. The owners claimed the capture was illegal, libelled the vessel and a United States Marshal was ordered to serve the writ. He climbed up the side of the schooner, found but one man on board, made known his business, and on a hail being given, the prize master and the lieutenant of *La Concord* started for the ship. It was then nine at night. The lieutenant denied the Marshal's right to serve a writ after dark and went back to the frigate. In an hour or two, twelve armed marines came from *La Concord*, boarded the schooner, weighed anchor and soon had her lying between the guns of the frigate and a French privateer. At midnight Antoine Charbonet Duplaine, the French Vice-Consul, came to the ship and told the Marshal the prize master should hold her, which he did for the space of three days. Then *La Concord* sailed away. The Marshal got assistance and drew the schooner to the wharf. For this offense Washington revoked the exequatur of Duplaine."

Such incidents were the logical outcome of attempts to use our ports as places of depot for the belligerents.

This was the beginning of the end and shortly thereafter Genet was recalled.

That the United States was not altogether free from blame in these controversies with France over neutrality is admitted by the Court of Claims in the famous case which so admirably sets forth the historic origin of the French Spoliation claims.

See Gray, *Admr. v. United States*, 21 Ct. of Claims, 340.

"Nor were we altogether clear of blame. We had not complied, so far as appears, with the stipulations of the treaties of 1778, intended to provide for possible war; we had not protected the West India Islands, and not only had we refrained from acting as the ally of France, but by the Jay Treaty we had given to her *enemy* the exclusive port privileges which she most valued and which were secured to her by the Treaty of Amity and Commerce" (p. 360).

. . . .

"Matters now again reached a halting point; neither side would yield; France acknowledged her real object to be to avoid payment of indemnity, while the United States on the other hand *could not assent to her views as to the guarantee and use of ports*" (p. 384).

*The claims of the United States rested upon international law. Those of France rested upon special treaty provision. There were weighty arguments on both sides and after months of weary discussion, the parties finally agreed that France should renounce her treaty rights and the United States should renounce her claim to indemnity, and,*

*"so died the treaties of 1778 with all the obligations which they imposed, and with them passed from*

the field of international contention the claim of American citizens for French spoliation" (p. 387).

The difficult situation in which the United States found itself by reason of its treaty stipulations as between France and Great Britain is well set forth by the Court of Claims (p. 356):

"We had promised France that their ships of war and privateers might freely carry whithersoever they pleased the ships and goods taken from their enemies; that these prizes should not be arrested, or seized, or examined, or searched in our ports, but might at any time freely leave, while no shelter or refuge was to be given to vessels having made prizes of her 'subjects, people or property.' (Art. 17, Treaty of Commerce, 1778.) *The United States had thus given France, and for consideration, not only a valuable, but an exclusive right;* yet the Jay treaty, in the twenty-fifth article, gave these same privileges to Great Britain, including all vessels which 'should have made prize upon her subjects.'

The conflict of the treaties is evident and of course was fully appreciated at the time.

. . . . .

France was restive under the situation, and, shortly after the ratification of the treaty, asked whether the President had caused orders to be given to prevent the sale of prizes conducted into the ports of the United States by vessels of the Republic or privateers armed under its authority. As to this question the Secretary of State informed the President:

'That the twenty-fifth article of the British treaty having explicitly forbidden the arming of [French] privateers, and the selling of their prizes in the ports of the United States, the Secretary of the Treasury prepared, as a matter of

course, circular letters to the collectors to conform to the restriction contained in that [article of the British treaty] as the law of the land. This was the more necessary, as formerly the collectors were instructed to admit to an entry and sale the prizes brought into our ports by the French.'

The Secretary also wrote our minister in London that orders had been given to prevent the sale of prizes brought into United States ports by French privateers, 'conformably with the twenty-fifth article' of the Jay treaty. *So we had finally and openly transferred any exclusive rights of France under the treaty of commerce to her bitter enemy, Great Britain.*" (p. 358.)

These various difficulties and the origin of our neutrality laws are fully treated by Moore in his great work on International Arbitrations (Vol. IV, p. 3967).

The first act in the drama was Washington's proclamation of neutrality, proclaiming that "the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers." The difficulty in maintaining such neutrality was not only the condition of the country at the time and the division between the French and the English factions, but the undoubtedly difficult and embarrassing position in which the United States was involved by having accorded to France exclusive treaty privileges, and especially the provision allowing such use of its ports as was necessarily incompatible with impartiality to the belligerents.

Mr. Hammond, the British Minister, called to the attention of Mr. Jefferson, Secretary of State, the fact that British vessels captured by French frigates had been brought into Charleston and condemned as prizes by the French Consul, who was assuming to exercise the powers of a Court of Admiralty.



"Mr. Jefferson replied that the judicial act performed by the French Consul at Charleston was not warranted by the usage of nations nor by treaty, and consequently was a mere nullity, and that it involved a disrespect to the United States to which the government could not be inattentive." (p. 3970.)

A number of captures were made by privateers, fitted out and armed in the United States, and finally the *William* and the *Fanny* were brought to Philadelphia "and the interposition of the Courts was invoked to secure their restitution. Judge Peters of the District Court \* \* \* decided in June, 1793, that he had no jurisdiction in the matter, even though the capture was made within the territorial limits of the United States." (p. 3971.) He stated that "the whole of the case was novel in the United States."

This statement has a familiar sound, for the present case is claimed to be "novel" also. In principle, at least, it would appear to be almost coeval with the Republic.

The Court having thus refused to act, the President decided to act for himself, and the Secretary of the Treasury, Alexander Hamilton, on August 4, 1793, sent to the collectors of customs instructions providing among other things that:

"If any vessel of either of the powers at war with France should bring or send within your district a prize made of the subjects, people, or property of France, it is immediately to be notified to the governor of the State in order that measures may be taken, pursuant to the seventeenth article of our treaty with France, to oblige such vessel and her prize or such prize when sent in without the capturing vessel, to depart.

No privateer of any of the powers at war with France coming within a district of the United States can, by the twenty-second article of our

*treaty with France, enjoy any other privilege than that of purchasing such victuals as shall be necessary for her going to the next port of the prince or state from which she has her commission. \* \* \**

If any such armed vessel shall appear within your district, she is immediately to be notified to the governor and attorney of the district, which is also to be done in respect to any prize that such armed vessel shall bring in or send in." (pp. 3971, 3972.)

Mr. Jefferson in his note to Mr. Hammond of September 5, 1793, states that prizes taken contrary to our neutrality must be restored and that this must be done not only in behalf of those nations with whom we have treaties but likewise with others. Restitution or compensation must be made to the nation whose vessel has been taken in violation of the rules of neutrality as known to the law of nations.

As to the shipping of arms and munitions of war, Mr. Jefferson said that the citizens of the United States were free to make, vend and export arms, subject to the penalty of confiscation, if such arms should be seized by any of the belligerents on the high seas. He also notified Mr. Hammond that where a vessel had been captured by one of the belligerents as in violation of the neutrality of the United States "persons should be appointed as representatives of the Governments concerned to ascertain the fact and decide what should be done."

Thus were the President and Secretary of State endeavoring by executive action to remedy the wrong done by the violation of American neutrality. Such act on the part of the executive was necessary because of the refusal of the lower courts to enforce the law. Doubtless this was not due, as Mr. McMaster apparently thinks, to corruption, but to sympathy with France and deference to public opinion, as well as to judicial hesitation when facing a new situation. It was

easier for the courts to pass the matter over to the executive department on the ground that it was a political question. The Supreme Court, however, did not shrink from the responsibility and, fortunately, the question early came before them. Professor Moore states the matter as follows:

"However, the Supreme Court rendered in the case of the sloop *Betsey* a decision that dissipated the doubts which had existed as to the jurisdiction of the courts of the United States to intervene in respect of prizes made by cruisers illegally fitted out and armed in the United States." (*Id.*, p. 3977.)

The *Betsey* was captured by *Le Citoyen Genet* and brought into Baltimore, where she was libeled for restitution in the District Court of the United States for the District of Maryland. The captor pleaded to the jurisdiction, setting up the French Treaty, and his plea was sustained. This was affirmed by the Circuit Court. The Supreme Court reversed the decree and remanded the case for final decision on the merits, holding that the District Court, being possessed of all the powers of a court of admiralty, instance as well as prize, was competent to decide whether restitution should be made, and that the admiralty jurisdiction which had been exercised by the French Consuls in the United States was unwarranted and "not of right."

The decree states:

"And the said Supreme Court being further clearly of opinion that the District Court of Maryland has jurisdiction competent to inquire and to decide whether in the present case restitution ought to be made to the claimants, or either of them, in whole or in part, that is whether such restitution can be made consistently with the law of nations and the treaties and the laws of the United States \* \* \*"

Apparently nothing further was heard of the question of jurisdiction in this class of cases after this decision.

On August 9th, 1794, the District Court in Charleston took jurisdiction in the case of the *Brigantine Vrow Christina Magdalena* (Bee. 11, Fed. Cas. No. 7216).

"The Judge on considering the arguments in support of the plea to the jurisdiction overruled the same as irrelevant, 1st, Because the 17th Article of the Treaty with France contemplates only French vessels of war or privateers legally appointed. 2nd, Because the 6th Section of the Act of Congress of the 5th of June last *does not lessen the jurisdiction of the District Courts in any case of which they had previous cognizance; and the decree of the Supreme Court of the United States in the case of Glass and others against the sloop Betsey having declared that every District Court of the United States possesses all the power of an admiralty court whether considered as an instance or prize court, this cause was therefore cognizable therein by the law of nations and the constitution of the court.*"

This decision in the case of the *Betsey* was most important. *At the time no statute on the subject existed* and the duties of the United States as a neutral nation depended upon the customary usages of nations, save where covered by special treaty. The case of the *Betsey*, therefore, not only overruled all the decisions of the lower courts refusing jurisdiction in this class of cases, but established at that early date (1794) the proposition that the courts of the United States had power to enforce and vindicate international law. This case was sufficient to establish the jurisdiction of the court in the present case to make restitution of the *Appam* upon the ground that she was illegally seeking asylum in a neutral American port, contrary to the law of

nations, as recognized by the Government of the United States. The French Treaty clause was in vain invoked as excluding the jurisdiction of the Court, precisely as the claimants here invoke the similar Prussian Treaty Clause. (See Appendix, pp. 108, 112.)

It is now impossible to contend in courts of the United States that rules of international law which by usage, custom or assent have become part of the law of the United States, may not be enforced by our courts. It is true that the courts of the United States do not, in the absence of statute, possess criminal jurisdiction; but the Constitution, in giving them admiralty and common law jurisdiction, has also clothed them with power to administer the law of nations, which is part of our own law. This was stated in the leading case of the *Paquete Habana* (175 U. S., pages 677-700), by Mr. Justice Gray with admirable lucidity, as follows:

"International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose where there is no treaty and no controlling executive or legislative act, or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, \* \* \* not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

The Court in that case cites with approval the case of *The Betsey*.

In the case of *The Scotia*, 14 Wall., 170, the Supreme Court said:

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obliga-



tion, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. \* \* \* And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. \* \* \* This is not giving to the statutes of any nation extra-territorial effect; it is not treating them as general maritime laws, but is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations."

In other words, the court, in order to ascertain the Law of Nations at any given time, may look to any reliable source of information in regard to the assent of the various nations to a particular rule. In this way the court in the present case looks to the German Prize Code as one source of information as to the use of neutral ports and finds that the German expression of the rule coincides with that of the Hague Convention.

The decision in the *Betsey* case was followed on June 5th, 1794, by the Neutrality Act, which, with some

additions, has remained the law up to the present time. This Act sought to meet the difficulties that had arisen out of the great European struggle and had for its object the declaration and codification of the policy followed by Washington and Jefferson and based by them upon the law of nations.

It thus appears that the Executive, the Supreme Court and the Legislature, each within the orbit of its proper functions, reached unanimous conclusions as to the law of neutrality. This statute did not, save in criminal cases, limit the jurisdiction of the courts to the precise acts covered by it. A statute of this kind may either cover all the international obligations of neutrality or only a part of them. Again, it may conceivably enforce, as part of the municipal law, various obligations which do not by the law of nations fall upon individual states. The statute itself makes it clear that it is not in its specific enactments as broad as the obligations which may be entailed by the law of nations, for in the eighth clause it is provided that it shall be lawful for the President of the United States, to compel "any foreign ship or vessel to depart the United States in all cases in which *by law of nations or the treaties of the United States they ought not to remain within the United States.*" (Moore, *Int. Arb.*, p. 3980.)

The arbitral board constituted under Art. VII of the Jay Treaty (1794) construed the obligations arising towards Great Britain out of various seizures made by French war ships in violation of American neutrality. These cases were predicated either on the augmentation of armament or of crew, or the fitting out in American ports, or capture within the limits and jurisdiction of the United States. Even before the passage of the Neutrality Act, the Executive had determined that restitution must be made of such vessels, or where restitution was impossible, compensation by way of damages. In the case of *The Fanny*, the question of how far territorial jurisdiction extended was deter-

mined. Mr. Jefferson in his letter to Genet, June 5th, 1793, referring to the violations of American neutrality by equipment of privateers in American ports, says:

"On these considerations, Sir, the President thinks that the United States owe it to themselves and to the nations in their friendship, to expect this act of reparation on the part of vessels marked in their very equipment with offense to the laws of the land, of which the law of nations makes an integral part." (*Id.* p. 4010.)

Referring to the proceedings that had been instituted against the captors in the District Court of Pennsylvania, and in which that court decided that it had no jurisdiction because of the obligation of the treaty with France, Mr. Jefferson wrote to Mr. Genet as follows:

"The intention of the letter of June 25th having been to permit such vessels to remain in the custody of the Consuls instead of that of a military guard (which in the case of the ship *William* appeared to have been disagreeable to you), the indulgence was of course to be understood as going only to cases where the Executive might take or keep possession with a military guard, and not to interfere with the authority of the courts of justice in any case where in they should undertake to act. My letter of June 29th, accordingly, in the same case of the ship *William*, informed you that no power in this country would take a vessel out of the custody of the courts and that it was only because they decided not to take cognizance of that case that it resolved to the Executive to interfere in it.

"Consequently this alone put it in their power to leave the vessel in the hands of the Consul. The courts of justice exercise the sovereignty of this country in judicial matters, are supreme in these and liable neither to control nor opposition from any other branch of the Government." (*Id.* p. 4013.)

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Mr. Jefferson further discusses the question whether the restitution of vessels so taken is a matter within the duty and competency of the Executive or of the judicial branch of the Government. He points to the fact that "one of the subordinate courts of admiralty has been of opinion in the first instance in the case of the ship *William*, that it does not belong to the judicial. Another perhaps may be of a contrary opinion. The question is still *sub judice*, and an appeal to the court of last resort will decide it finally." He proceeds to say that this is a mere "question of internal arrangement between the different departments of the Government depending upon the particular diction of the Constitution and laws, and it can in no wise concern a foreign nation, to which department these have delegated it" (*Id.* p. 4014).

It appears from the history of these controversies that executive restitution was made merely pending the decision of the question whether such restitution fell within the province of the executive or the judiciary. Subsequent to the decision of the Supreme Court in the *Betsey* case the restitution in such cases became a matter for the judiciary.

In other words, a function which, during a period of doubt had been exercised by the Executive, now by decision of the Supreme Court devolved upon the judiciary. To foreign nations it is a matter of little concern which Department should deal with the matter, but it is evident that our Department of State is acting in accordance with national traditions in leaving the question at bar to the judiciary.

The construction placed by the Executive upon the treaty clauses allowing prizes to be taken into American ports was set forth in Mr. Jefferson's letter to Galatin, August 28th, 1801 (Moore's Digest of Int. Law, Vol. VII, Sec. 1302, pp. 935, 936):

"The doctrine as to the admission of prizes maintained by the Government from the commencement

of the war between England, France, etc., to this day has been this: the treaties give a right to *armed vessels with their prizes* to go where they please (consequently into our ports) and that these prizes shall not be detained, seized nor adjudicated, but that the armed vessel may depart as *speedily as may be with her prize to the place of her commission*; and we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty, no stipulation stood in the way of permitting France to sell her prizes here; and we did permit it, but expressly as a favor, not as a right. \* \* \* *These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold.*" (p. 936.)

and again Mr. Pickering, Secretary of State, in 1796 writes:

"The sale of prizes brought into the ports of the United States by armed vessels of the French Republic \* \* \* has been regarded by us not as a right to which the captors were entitled either by the law of nations or our treaty of amity and commerce with France." (p. 936.)

It is thus apparent that under the interpretation placed upon the clause of the French treaty, similar to that of the Prussian treaty, now in question, little more was granted to the vessel and her prize than would now be allowed under the law as declared by Art. 21 of the Hague Convention XIII. The vessel might come in with her prize where actual necessity required, but must go out again. It is idle to endeavor now to interpret the Prussian treaty by reference to the letters *inter sese* of the distinguished Americans who were engaged in the effort to persuade Prussia to make it. Whatever interpreta-



tion might have been put upon the language of the treaty as an original matter, it is now settled that it scarce did more than allow war vessels accompanied by their prizes to enter the harbor, where humanity required that they might seek temporary shelter, and then "as speedily as may be" to go out again "to the places named in the commissions" of the captor vessels. This very phrase of the treaty excludes the inference that the prizes might be commissioned to remain in American ports, as was attempted to be done in the case of the *Appam*.

The State Department is thus following early and settled Executive as well as Judicial authority in holding that the Prussian treaty clause, even were it here applicable, would not permit the vessel to remain in the port; nor is such treaty clause to be interpreted as permitting the vessel to go into the port at all for the purpose of seeking permanent asylum. The more the question is analyzed the more it will appear that these ancient treaty stipulations were narrowly construed by the United States in the maintenance of the policy of strict impartial neutrality. War vessels with or without prizes might have been absolutely excluded from our ports; by treaties with some nations we allowed them temporary shelter. We refused to consider this temporary shelter, as desired by the capturing belligerent, as an asylum, and the treaties, even where applicable, were thus interpreted in a fashion not inconsistent with fair neutrality.

It was said by Attorney General Wirt:

"It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports and put in a condition to be taken to the port of the captor for adjudication."

2 Op., 86.

Assuming the Attorney General to have been correct as to the allowance for necessary repairs this, of course, could have no application to a vessel that sought one of our ports when it was very much nearer to its own, with the object of seeking *not temporary relief, but permanent asylum.*

Cushing, Attorney General (1855):

"A neutral nation while admitting belligerent men of war to its ports may, as it sees fit, wholly admit or wholly exclude their prizes."

7 Op., 212.

Clay, Secretary of State (1828):

"The laws of the United States do not admit of the sale within their jurisdiction, for any purpose, of prize goods taken by one belligerent from another and brought *into their ports.*"

\* \* \*

"Neither belligerent is allowed by the laws of the United States to sell his prize within their ports."

Moore's Digest, Vol. VII, p. 937.

Replying to the Peruvian Legation as to the course that the United States would pursue during the war between Spain and Peru, Mr. Seward said:

"This Government will observe the neutrality which is enjoined by its own Municipal Law and by the law of nations. *No armed vessels of either party will be allowed to bring their prizes into the ports of the United States.*"

Moore's Dig. Vol. VII, p. 938.

In treating of the question of asylum, Attorney General Cushing held that the admission of armed vessels of a belligerent, whether men of war or private armed

cruisers, with their prizes, into the territorial waters of a neutral for refuge, whether from chase or from the perils of the sea, is a question of mere *temporary* asylum accorded in obedience to the dictates of humanity and to be regulated by specific exigency (7 Op. 122).

Referring to the admission of French prizes Mr. Jefferson said that this right "is secured to her (France) exclusively of her enemies as is done for her in a like case by Great Britain, were her present war with us instead of Great Britain." The admission of public vessels, however, in case of stress of weather, etc., he says is not exclusive "as we are bound by treaty to receive the public armed vessels of France and are not bound to exclude those of her enemies" (Moore's Dig. Vol. VII, p. 983).

Much is attempted to be made of the attitude of the United States in regard to the so-called Bergen prizes referred to in Moore's Digest, Sec. 1314. These prizes were three British vessels captured in 1779 by the *Alliance* of Paul Jones' squadron, and taken into Bergen, where upon the demand of the British Minister they were seized by the Danish Government and restored to their owners, on the ground that as Denmark had not acknowledged the independence of the United States, the prize could not be considered as lawful. Claim was made by the United States against Denmark, and correspondence followed, but the claim appears to have been ultimately abandoned. Congress, as a matter of generosity, authorized the Treasury to make payment to the legal representatives of Jones, the officers, seamen, etc., of their fair proportion of the value of the prizes.

The history of this incident may be followed in detail in Wharton's Diplomatic Correspondence of the American Revolution (Volume 3, pages 385, 433-435, 528, 534, 540, 597, 678 and 744; Volume 5, page 462; Volume 6, pages 261, 717).

See also Act of Congress of March 28th, 1806, 6 U. S. Statutes, 61.

It fully appears from this correspondence, and espe-

cially from Benjamin Franklin's letter, printed in Volume 3, pages 433-435, that the general question of asylum for prizes was not discussed to any extent, and in any event was not the ground upon which Denmark acted. The prizes were brought into Bergen under stress of weather and for necessary repairs, and thus came within the purview of the rule now declared in the Hague Convention. The claim made by the United States might well be justified on this ground, but in any event it was not acceded to, no arbitration was had and no precedent was created except one *against* the right of asylum. The payment by the United States was an act of generosity, and not the declaration of a rule of law.

Appellants are clearly in error when they seek to eliminate from the discussion the actual cause of the resort to Bergen (Brief, p. 61). This appears from one of the quotations in their own brief (p. 63).

This brief *résumé* indicates the dangers incident to permitting neutral ports to be used as a base for belligerent operations. Pragmatically speaking, the rules formulated in Arts. 21 and 22 of the Hague Convention are not only sound, but constitute the only safe course for a neutral nation to adopt.

## POINT IV.

The Courts of Admiralty of a neutral country have jurisdiction of a suit by the owner of a prize which has been brought into a port of the neutral, and may award restitution when there has been a violation of neutrality on the part of the captor, whether inherent in the capture, or prior or subsequent thereto.

The appellants find themselves forced to admit as *beyond question* that "where a vessel claimed as a prize is lying in a neutral port, the courts of that country have jurisdiction concerning it" (Appellant's brief, p. 39), and may award restitution for a breach of neutrality by "an act in derogation of the sovereignty of the neutral country" (*Id.* p. 42). Appellants' arguments are, accordingly, directed not to the jurisdiction itself, but to its extent.

A brief review of the historical development of this jurisdiction is accordingly in order.

Many of the leading cases have already been referred to in the preceding sketch of the national conditions under which the rules on the subject first became established in American jurisprudence.

The general jurisdiction of the courts of admiralty of a neutral nation to award some measure of relief in cases of prizes brought into the ports of such nation, was recognized and established in England at a very early date.

One of the earliest decisions is the case of Samuel Pelagii, sometimes cited as Palachi's Case, reported in 1 Rolle, 175, and 3 Bulstrode, 27. The report in Bulstrode is more complete than that in Rolle. This case was decided in the thirteenth year of King James I (1616), when Coke was Lord Chief Justice. It appeared that Spain and Morocco were at war; that Pelagii, claiming to be commissioned as an ambassador by the King of Morocco, had captured certain Spanish ships and goods and had sold the goods to English merchants. The Spanish



Ambassador libelled the goods in the Court of Admiralty. Application was made to the Court of King's Bench, apparently by the English purchasers, for a writ of prohibition against the proceedings in the Court of Admiralty. In spite of the great jealousy that then existed between the courts of common law and the courts of admiralty, this application was denied. Authorities on the civil law were apparently consulted, and the Report says:

"Then as to the goods which were taken on the sea the civilians held that because he brought them in *solo amici*, notwithstanding the taking of these was not felony, yet they may there deal civilly for them in the Court of the Admiralty and he ought there to answer civilly, and therefore no prohibition was to be granted."

In the *Lex Mercatoria*, published in London in 1729, the general rule is laid down as follows, at page 179:

"If a ship having letters of marque or reprisal shall take the ships and goods of that nation against whom the same are awarded, and bring the same into a neuter port, the owners may there seize her or there the admiral may make restitution according to law as well of the ships and goods to the owners as the captives to their liberty; for that the same ought first to have been brought *infra praesidia* of that Prince or State by whose subjects they were taken."

The same principle is expressed in Molloy's *De Jure Maritimo*, Vol. 1, pp. 14, 15 and 58; also in the "Laws of the Admiralty," published in London in 1767, Vol. 1, p. 219. The two authorities last cited make a distinction between captures made by privateers and captures made by national men-of-war, but this is a distinction which has not been recognized in American jurisprudence, as will particularly appear from the opinion of Chief Justice Marshall, in the Circuit Court, in the case of the *Santissima Trinidad*, hereinafter quoted (pp. 57-61).

There are certain early decisions in the American Federal Courts which, as has already been indicated, were wholly swept away by the decision in the case of *The Betsey*, but which may be here referred to for the convenience of the court, viz.:

*Moxon v. The Fanny*, 2 Peters' Admiralty, 309; 17 Fed. Cas., No. 9895.

*Findlay v. The William*, 1 Peters' Admiralty, 12; 9 Fed. Cas., No. 4790.

*Stannick v. The Ship Friendship*, Bee's Admiralty Rep., p. 40; 22 Fed. Cas., No. 13291.

*Moodie v. The Ship Amity*, Bee's Admiralty Rep., p. 89; 17 Fed. Cas., No. 9741.

It may be noted that in the *Friendship* case the court refused restitution on the ground of the provisions of the French treaty, but said:

"By the law of nations, the bringing *infra praesidia* of a neutral nation might justify restitution in any case."

As already pointed out (*supra*, pp. 42, 43), the leading case, and the one which shaped the course of American jurisprudence on the subject, is *The Betsey* (3 Dall., 6.) This was a suit in admiralty for the restitution of a vessel captured by a foreign belligerent and brought into an American port. It was decided by the Supreme Court on the question of jurisdiction, and remitted to the District Court for determination on the merits. It appears from the transcript of record on file in the office of the Clerk of the United States Supreme Court, that the breach of neutrality alleged in the libel was the capture on June 21, 1793, within the territorial waters of the United States, to wit, "within two miles from Cape Henry, the southern promontory of the Chesapeake Bay," and after an American pilot had been taken aboard. The captor pleaded that the capture was made fifteen miles from the coast of the United States, and set up the provisions of the

French treaty as a bar to the jurisdiction, claiming that under that treaty prizes taken by the French "may come into and go out of the American ports at pleasure" (3 Dall. at p. 11), just as is claimed here. Upon appeal to the Circuit Court it was stipulated that the capture was made at the place alleged in the plea. This left as the issue of fact to be determined the question whether the ship and cargo were of neutral or enemy character. (See Extracts from Transcript of Record, Appendix, pp. 117-124, *infra*.)

The decision of this court determined that the court below had jurisdiction to try this issue of fact and to award restitution if it appeared that the ship or cargo was neutral, and that the treaty provisions were no bar to the exercise of this jurisdiction.

The libellants argued, with much force, in the *Betsey* case, and the Supreme Court evidently agreed with them, that:

"The act of bringing the vessel into an American port must be regarded as a voluntary election to give a jurisdiction which they [the captors] might otherwise have avoided."

That is exactly what the captors have done in the case at bar, and they have travelled twice the distance necessary to take the vessel into one of their own ports, for the purpose of doing so.

Another very important decision is the *Santissima Trinidad* (1 Brockenborough, 478; Fed. Cas. No. 2568; affirmed 7 Wheaton, 283). Chief Justice Marshall, sitting in the Circuit Court, discussed at length the questions whether restitution could be awarded by the court, as well as by the executive branch of the government, also whether such restitution could be awarded upon the claim of the private owner alone, and also whether any distinction was to be made between captures made by privateers and by national vessels. Upon these subjects he said:

"A question of much more difficulty remains to

be considered. By what department of the government is this restitution to be made? Without recapitulating much of what has been said at the bar, by stating the reasons on which my opinion is founded, I will acknowledge, that in my private judgment, this right and this duty devolve on the executive, or legislative, and not on the judicial department. The exercise must be regulated by a discretion, which courts do not possess, and may be controlled by reasons of state, which do not govern tribunals acting on principles of positive law. If, therefore, this was a case in which my own judgment was alone to be consulted, I should, I believe, confine myself to the inquiry, whether any act of Congress authorized the restitution sought by the libellants. But this court is not at liberty to decide for itself. It is bound, and ought to be bound, by the decisions of the Supreme Court, and its judgment must conform to those decisions. They are admitted to have settled the principle, that property captured by privateers, fitted out, armed, or manned, within the ports of the United States, and brought within the power of our courts, may be restored by them to the original owner. It is, however, contended that the same principle does not extend to captures made by national ships. That national ships are in many respects distinguishable from privateers, is not to be denied; is this case one in which a sound distinction can be taken between them? Ships of war and privateers, both cruise under a commission from their sovereign, and both make prizes under the authority of that commission. In both cases, the sovereign is the captor, and the prize vests absolutely in him. The cruizer, in both cases, is a mere instrument of war employed by his sovereign, and the particular interest which the agent may have in the thing acquired, depends on municipal regulations, of which this court can take no notice. The courts of the captor

will in both cases distribute the proceeds according to those municipal regulations, but foreign courts consider the property as the property of the sovereign, and the possession of the captor as the possession of the sovereign. In both cases, then, the foreign court which acts upon the prize, acts on property in the possession of a foreign sovereign, acquired by his authorized agent. In what then does the difference between the right of courts to interfere with their prizes consist?

We are told that the national ship of war, carries upon its deck a portion of the sovereignty of its prince, and is, of course, inviolable. I am not prepared to say that a privateer, commissioned for the purposes of war, is not equally inviolable, at least so far as respects its military operations. But I will not enter into this inquiry. I will ask, how is this inviolability acquired, and how far does it extend? In the case of *The Exchange*, 7 Cranch (11 U. S.), 116, the Supreme Court laid down the principle expressly, that this exemption from the jurisdiction of the nation, in which the national ship of a foreign sovereign is found, is derived, where there is no express compact, from the assent implied in the admission of such vessel into port. But the same case establishes this further principle; that this immunity is granted on condition that the sovereignty of the place be respected. A breach of the condition forfeits the immunity depending on it.

A national ship, openly and grossly violating the laws of a neutral government, enlisting a full crew, in opposition to those laws, forfeits the condition on which an exemption from those laws

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4. The *Grange* was a British ship, which had been cleared out from Philadelphia, in 1793, and was captured by the French frigate *L'Ambuscade*, within the capes of the Delaware, while on her way to the ocean (2 Marshall's Life of Washington [Rev. Ed.], 262).



was granted. On this principle the *Grange* was restored.\* The government acts without being charged with a violation of faith. If the government acts, it acts by that department which is entrusted with the power of inquiring whether the belligerent has violated those neutral rights which forfeit his prize, and if the courts exercise this power rightfully, in the case of prizes made by privateers, they may, I think, exercise it in the case of prizes made by a national ship and brought within our territory. If there is a fallacy in this reasoning, I do not perceive it. But, supposing it to be applicable to a capture made within our waters, and immediately arrested, it is contended, that it is inapplicable to a capture made on the high seas, and brought within our waters. The violation of neutrality gives, it is said, a claim on the sovereign, whose power is an unit, and cannot give rights to seize prizes made by one vessel more than by another. When the offending vessel comes again into port, she comes in with all the immunities originally attached to her. In theory, this argument is strong; but, practically, it would destroy the efficacy of the principle. It would deprive the neutral government of its power to give specific relief; and seems to me to be as applicable to prizes made by privateers as by national ships.

Another idea was suggested by the counsel for the claimants, of which I feel the full force. It is, that this application to the neutral sovereign to vindicate his neutral rights, and repair the wrongs done to a foreign sovereign, must be made by that foreign sovereign himself, through his authorized agent, and not by a private individual. Were I to admit this, the question immediately occurs—Does not this objection go as strongly to the restoration of prizes made by privateers, as to the restoration of prizes made by national ships? I am not sure that I am master of that train of

reasoning which has conducted the Supreme Court, to the assertion of that jurisdiction over prizes made by privateers, which has been exercised. If I were, I should not attempt to give it, because it will be stated more ably by those who are themselves convinced of its propriety. I content myself with saying that I think the principles on which prizes made by privateers have been restored, apply to prizes made by national ships, who have violated the neutrality of the United States, and I, therefore, hold myself bound to restore in this case. The sentence of the district court is affirmed."

Chief Justice Marshall's decision was affirmed in all respects by the Supreme Court, and the following further principles were also laid down:

1. That "whatever may be the exemption of the public ship herself and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and inquiry, and, if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality."

2. "That where a property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can by its adjudication rightfully take away its jurisdiction or forestall and defeat its judgment."

(See 7 Wheaton, at pages 354 and 355.)

The case of *The Exchange* (7 Cranch. 116), where a prize which had been converted into a public armed vessel was held exempt from the jurisdiction of our courts, was distinguished on this ground, and it was held that a condemnation as prize pronounced in the courts of the captor's country after the institu-

tion of suit in the American courts did not operate to oust the American jurisdiction.

Other cases which illustrate the general rule are:

*L'Invincible*, 1 Wheaton, 238.

Here the Court said, at page 258:

"That the mere fact of seizure as prize does not of itself oust the neutral admiralty court of its jurisdiction is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession, to wit, those in which her own right to stand neutral is invaded."

*The Divina Pastora*, 4 Wheaton, 52:

"But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

*The Estrella*, 4 Wheaton, 298:

"It is true they (the Statutes) recognize a right in the courts of the United States to make restitution, when these laws have been disregarded, and impart to the courts a power to punish those who are concerned in such violations. *But in the absence of every act of Congress in relation to this matter the court would feel no difficulty in pronouncing the conduct here complained of an abuse of the neutrality of the United States; and although in such case the offender could not be punished the former owner would nevertheless be entitled to restitution.* Nor is our opinion confined to the single act of an illegal enlistment of men, which is the only fact proved in this case, for we have no hesitation in saying that for any of the other violations of our neutrality alleged in the libel if they had been proved the Spanish owner would have been equally entitled to restitution.

*La Amistad de Rues*, 5 Wheaton, 385:

"Whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, *it shall be restored to the original owners*. This is done upon the footing of the general law of nations, and the doctrine is fully recognized by the Act of Congress of 1794."

See also:

*The Brig Alerta*, 9 Cranch., 359.

*La Concepcion*, 6 Wheaton, 235.

*The Monte Allegre*, 7 Wheaton, 520.

*The Santa Maria*, 7 Wheaton, 490.

*The Arrogante Barcelones*, 7 Wheaton, 496.

In this last case restitution was awarded as against the original unlawful captor, although the prize had been condemned by a prize-court and had come back to the possession of the original captor by mesne conveyances. The court held that such an adjudication might protect a *bona fide* purchaser, but would not enure to the benefit of the offender.

Also:

*Talbot v. Jansen*, 3 Dall., 133; Fed. Cas., No. 7216.

*Fay v. Montgomery*, Fed. Cas., No. 4709.

*Cushing v. United States*, 22 Court of Claims, 1.

*Consul of Spain v. Consul of Great Britain*,

Bee's Admiralty Rep., 263, 6 Fed. Cas., No. 3138 (1808).

In this last case the court granted an injunction to stop the sale of a Spanish vessel captured by a British man-of-war and brought into an American port, and held that such a sale should not be held without the express permission of the United States, as it was inconsistent with the sovereignty of the United States.

There is a very striking case, decided by the Admiralty Court at Halifax in 1864: *The Queen v. The Chesapeake* and cargo (1 Oldright's Nova Scotia Reports, page 797). In this case an American vessel sailing from New York was captured by some Confederates who had shipped thereon as passengers, some of them holding naval commissions from the Confederate States. They overpowered the captain and crew, and took the vessel into a Canadian port. A suit was instituted in the name of the Crown for the forfeiture of the vessel for violation of British neutrality. Claim was made on behalf of the private owners, and restitution to them was ordered, on payment of costs and expenses. The case is discussed at some length in Moore's Digest of International Law, Volume 1, page 366, and Volume 7, page 937.

In the course of his opinion on the final hearing, the Judge of the Vice-Admiralty Court said:

"By the affidavits upon which I granted a warrant it is certain that the *Chesapeake*, if a prize at all, is an uncondemned prize. For a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it *ipso facto* subjects that prize to forfeiture. *For a neutral state to afford such protection would be an act justly offensive to the other belligerent state.*"

At a prior hearing on Jan. 13, 1864, the Court had stated:

"Captures lawfully made by a belligerent may by subsequent misconduct of the captors in respect to such capture, so divest themselves of their vested rights as to take from them the aid of the Court of Admiralty.

• • • • •

"More than sixty years ago Sir Alexander Croke decided, not on a statutory provision but on the



common law of admiralty, in the case of *La Reine des Anges*, that the right of a captor to a prize which had vested in him was, by his subsequent conduct in respect to the captured vessel, wholly divested, and he condemned her as forfeited to the Crown *jure coronae*."

The case of *La Reine des Anges* above cited is reported in Stewart's Admiralty Reports (Nova Scotia), at page 11. It was decided in 1803. In that case the prize was declared forfeited to the Crown on account of the captor's failure to comply with the established prize regulations. The breach of the regulations was a sale of the prize before condemnation.

There are a number of cases, both in England and this country, which hold that in condemnation proceedings in the prize courts of the captor's country the private owners cannot successfully set up as a defence the violation of another nation's neutrality, but that such a claim can be set up only by the neutral sovereign.

Here, of course, it is the neutrality declared by the *lex fori* that has been violated and no such question arises. The United States Neutrality Act, moreover, expressly gives jurisdiction to the District Courts in the event of territorial violations, as shown above.

See, as illustrating the general rule,

*The Purissima Concepcion*, 6 Rob., 45.

*The Vrow Anna Catharine*, 5 Rob., 15.

*The Eliza Ann*, 1 Dods., 244.

*The Diligentia*, 1 Dods., 404.

*The Twee Gebroeders*, 3 Rob., 161.

In the case last cited claim was made by the neutral nation and restitution was ordered. The actual capture was made outside of neutral territory by boats sent out from a belligerent ship which was itself in neutral waters: Sir William Scott said:

"I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say *remote* uses, such as procuring provisions and refreshments and acts of that nature which the Law of Nations universally tolerates, but that no proximate acts of war are in any way whatever to be allowed to originate on neutral grounds."

See also :

The *Anna*, 5 Rob., 373 (1805).

In this case a British privateer had captured an American vessel in American waters near the mouth of the Mississippi. The captors claimed that the ship was Spanish. The American diplomatic representative intervened in the English Prize Court and restitution was ordered on account of the violation of American neutrality.

See also

The *Sir William Peel*, 5 Wall., 517.

The *Florida*, 101 U. S., 37.

It is thus clearly established by the authorities that where the captor of a prize has violated American neutrality by illegally equipping his vessel, or augmenting his force, in the United States, or by making the capture in American waters, and thereafter brings the prize into an American port, its restitution will be ordered; in other words, that he will lose his right to the prize by violation of our neutrality prior to or in the act of capture. In the case at bar the violation of neutrality was subsequent to the act of capture and was a deliberate attempt to use an American port as a naval base for the safe-keeping of the prize during the war. The time of the violation of neutrality is immaterial; there has been a violation and the prize has been voluntarily brought within the jurisdiction of the American courts. The

power and duty to make restitution follow as a matter of course.

There are special statutory provisions, both in England and in this country for judicial restitution in certain specific cases of violated neutrality.

In Great Britain the Foreign Jurisdiction Act of 1870, in the case of a prize taken where British neutrality has been violated, provides that:

"Sec. 14. If during the continuance of any war in which Her Majesty may be neutral any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, \* \* \* it shall be lawful for the original owner of such prize, or his agent, or for any person authorized in that behalf by the Government of the foreign state to which said owner belongs, to make application to a court of Admiralty for seizure and detention of such prize, and the Court shall, upon due proof of the fact, order such prize to be restored."

Westlake, Int. Law, Part II, pp. 229, 230.

The District Courts of the United States also have the same power, for it is provided by the Act of 1818, which is still in force, that

"The District Courts shall take cognizance of all complaints, by whomsoever instituted, in case of captures made within the waters of the United States or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed \* \* \*; and in every case of the capture of a vessel within the jurisdiction or protection of the United States, as above defined; and in every case in which any process issuing out of any court of the United States is disobeyed \* \* \* it shall be lawful for the President \* \* \* to employ

such part of the land or naval forces \* \* \* in order to the execution of the prohibitions and penalties of this Title and to the restoring of such prize in the cases in which *restoration shall be adjudged.*"

See also Sec. 5287, U. S. Rev. Stat.

It is further provided in Sec. 5288 that the armed forces of the United States may be used to compel the departure of such a vessel. The authority of the President to employ such armed forces

"will be dependent upon the resistance to the process of the courts of the United States."

4 Op. Atty. Gen., 336, 338 (1844).

These statutory provisions, however, do not limit the admiralty jurisdiction of the Courts to these particular instances, they merely declare it.

The appellants claim that since there is no specific statute or express decision of our courts awarding restitution for the precise violation of neutrality here complained of, the court had no power to grant such relief in this case. If there were such a statute or a decision of this court exactly on all fours with the case at bar, all this argument would be superfluous.

This case, however, as decided by the court below, does not make new law. It is merely the application of established rules of international law to a particular set of facts not heretofore expressly adjudicated upon by our courts.

The general rule is that a prize brought into the port of a neutral nation may be restored for a violation of that nation's neutrality. The former cases deal with violations of neutrality by capture in neutral waters, or by illegal equipment of the vessel, or augmentation of the crew, but there is none in which it has been held that restitution could *not* be awarded for a violation of neutrality subsequent to the capture, and in the Chesapeake case restitution *was* awarded on this ground.

This is not a case of statutory construction where, it may be, *expressio unius exclusio est alterius*. It is a case where a general rule should receive, and has received in the court below, that developed application which is the principal source of formulated international or common law.

Our statutory law of neutrality is not exclusive or all embracing, and our rights and duties of neutrality under international law are not to be evaded or avoided by the invention of novel breaches of neutrality, not foreseen, and hence not expressly provided against by statute. This principle is admirably stated in the official Case of the United States Government before the Geneva Arbitration Tribunal, as follows:

"The obligation of a neutral state to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation, but it can neither 'create nor destroy it, for it is an obligation resulting directly from international law which forbids the use of neutral territory for hostile purposes.' " (Papers relating to the Treaty of Washington, Vol. 1, p. 47.)

*It is in principle as much a violation of neutrality for a prize to come into our ports to avoid recapture as it is for a war vessel to come into our waters to make a capture.*

The appellants cite no case (for the very good reason that there is none) in which it has been held by our courts, either under general international law or special treaty, that any belligerent ever had a right to send a prize into one of our ports, "there to lay up," safe from recapture for the remainder of the war and immune from the jurisdiction of any department of our government.

In *Hudson v. Guestier*, 4 Cranch, 293, cited by appellants at p. 37 of their brief, the crucial point was that there



had been a seizure in French territorial waters for violation of French municipal law. The court held that jurisdiction was thus lawfully acquired, and was not lost by the subsequent departure of the seized vessel and her escape to neutral waters. This is manifest from the decision in *Rose v. Himely*, which was argued at the same time with *Hudson v. Guestier*. There it appeared that the seizure was made outside of the territorial jurisdiction of the French Government for violation of a municipal regulation, and this court held that since the vessel had never been within French jurisdiction, the sale by the captor in a foreign port, and the subsequent condemnation by a French court, were without jurisdiction, and void. (See 4 Cranch, 241, 292).

In *Jecker v. Montgomery* (13 How. 498), cited by appellants at p. 38 of their brief, the sale under consideration was made at Monterey, then in the actual possession of the American military forces. The proceeds at the time of the litigation were in the United States Treasury, and the condemnation was for a violation of the municipal law of the United States in trading with the enemy. (See also second report in 18 How. 111).

In *Williams v. Armroyd* (7 Cranch, 423), cited by appellants at p. 53 of their brief, there was no question of any violation of neutrality. Moreover, there had been an actual sentence of condemnation by a French court having jurisdiction of the proceeds of the sale, and this was held to have been good *in rem*.

The general principles for which we contend are unchallenged and unshaken by any of the decisions cited by appellants.

## POINT V.

The Prussian Treaties of 1799 and 1828 did not make it lawful for the German prize master and crew of the "Ap-pam" to bring her into an American port to lay up, or to keep her here indefinitely.

The text of the relevant portions of the treaties is printed as an appendix to this brief, together with the text of the substantially contemporary treaties with Sweden, France and England. All of these treaties, except that with England, were in French, the language then chiefly employed in diplomatic documents. The original French text and the English translation (as published in 8 U. S. Stat.) are given in parallel columns. It is manifest from an examination of these texts that all of these treaties apply only to prizes which are brought into American ports by vessels of war, and do not apply to prizes arriving without convoy and merely under the command of prize masters. The treaty privileges are granted not to the prizes or their commanders, but to the vessels of war of the parties to the treaty, and such vessels are permitted to carry in their prizes and to carry them out again to the places expressed in the commissions of the capturing vessels, which commissions the officers of such capturing vessels are required to show.

They constitute exceptions and necessitate strict construction. The mere fact that the war vessel brought in the spoil of war did not release that spoil. The vessel could carry it out again. That is their extent.

The treaties contemplate merely a temporary stay for some particular necessity and do not permit a neutral port of refuge to be made a port of ultimate destination or of indefinite asylum. They were intended merely to extend the exemption of a public war vessel from the territorial jurisdiction of the United States, so as to include the prizes made by such public war vessel and still under her immediate convoy.

The opinion of the Secretary of State of March 2,

1916 (see Rec., pp. 17-19) in regard to the interpretation of the treaty is manifestly correct, besides being entitled to great respect as the construction of the treaty placed upon it by that branch of the Government primarily charged with its enforcement.

The original French text of the Prussian treaty of 1799 is free from the ambiguity that appellants impute to the English translation. It distinguishes clearly between "*vaisseaux de guerre*" (vessels of war) and "*prises*" (prizes), and this distinction is carried out through the whole article. The "*vaisseaux de guerre*" may bring ("*conduire*," from *con-duco*—to lead with) the "*vaisseaux pris*" into American ports, and these "*prises*" may go out and be carried (*conduites*) by the captor vessel (*le vaisseau capteur*) to the places named in the commissions which the officer commanding the said vessel (*le dit vaisseau*), i. e., the captor vessel, shall be obliged to show.

The linguistic learning and elaborate etymological exegesis lavished by the appellants upon the word "carry" and its Eighteenth Century usage are quite beside the mark, in view of the plain grammatical construction of the original French text of the treaty.

Appellants' historical review of the negotiations for the treaty actually militates against their own contentions. It demonstrates the three following points:

(1) That the American representatives were trying to get more than they finally got or reciprocally agreed to in return.

(2) That what the American representatives chiefly sought and actually did obtain was a right of access to Prussian ports for war vessels with prizes, instead of the complete exclusion which they feared. They got and gave a right to enter and depart under convoy, but not a right to indefinite asylum, to sequestration or to make sales.

(3) That the convoy of a war vessel to protect its prizes was insisted upon as essential because, as the

Prussian Sovereign pointed out, some of his principal ports were not fortified, and he therefore could not protect a prize which came in for shelter without a war vessel to defend it against hostile attack. (See Appellants' brief, page 87.)

The Prussian treaty was never intended to give to either party the right to use the ports of the other as a place of depot for prizes or other spoil of war. The tendency of the time was to prohibit generally the entry of both ships of war and of prizes and to permit it at all only to those nations favored by special treaty. The right secured by such special treaties was merely the right of entry for temporary purposes—the right to enter and depart, instead of being altogether excluded—not the right to sequester during the war or pending condemnation.

By its express terms the Prussian treaty has no application to prizes navigating independently. The *Appam*, therefore, is not entitled to any special privileges under the treaty, but only to those privileges afforded by the law of nations generally to prizes of war, namely, to enter neutral ports only in case of unseaworthiness, stress of weather or want of fuel or provisions, and to leave as soon as the special cause of entry has been removed.

As the German prize master brought in the *Appam* not for any of the causes or purposes recognized by the law of nations but for the express and declared purpose of laying her up in an American port, she is entitled to no privileges, either under the treaty or under the general law of nations.

It is immaterial that the State Department did not announce its decision as to the applicability of the treaty immediately upon the receipt of the German ambassador's communication. If the treaty as properly construed does not apply, it cannot be given a provisional application by any delay of the executive authorities in considering the question, nor can such delay suspend

the operation of the general rules of international law, which, in our jurisprudence, are regarded as constituting a part of our own municipal law. The doctrine of suspension of law by executive action died with Charles I; the doctrine of suspension of law by executive inaction is novel and should be still-born.

The situation presented is analogous to a question of the constitutionality of a statute. It either is or is not constitutional from the beginning, irrespective of the length of time it may take the courts to determine the question, and no one can acquire indefeasible rights in reliance upon it merely because its unconstitutionality has not been expressly adjudicated.

The note of the Secretary of State of April 4, 1916, upon which appellants lay so much stress, is not in any way determinative of the questions involved in this case. It does not appear that the State Department at that time was cognizant of the fact that the German prize crew of the *Appam* was insufficient to take her out again and navigate her safely, and that therefore any executive order requiring her to depart could not have been complied with and would have been a mere idle formality. At most, the Secretary stated that in his opinion "the *presence* of the *Appam* in American waters under the circumstances" did not constitute a violation of neutrality. This is strictly true. The *Appam* was then held under process of the United States court, and her mere *presence* in American waters was, therefore, legitimate. The note did not deal in any way with the effect of the treaty on the *Appam's* entry.

It was not her mere presence in American waters, but her attempted use of them, not for temporary refuge but for permanent safe keeping, which constituted the violation of neutrality.

This note of April 4, 1916, only shows the desire of the State Department to preserve the *status quo* during the litigation and to leave the decision of the questions involved wholly to the court, without representations by



the State Department on either side of the controversy. This is further shown by the whole diplomatic correspondence on the subject.

The appellants' claim that the *Appam* came into our port in response to what they believed was an express permission, if not an invitation, and that therefore she was not a trespasser, at least until after notice to depart, since a guest is not a trespasser. But one cannot come under the guise of a guest and at the same time announce an intention to remain indefinitely. An invitation or permission to call does not confer the right to pitch one's tent and stay. Before the appellants had answered the amended or even the original libel, the State Department had announced its conclusions, and the Appellants then knew officially that they were trespassers (see Rec. pp. 2, 8, 17). According to a familiar rule of equity, very appropriate to be applied in admiralty, "it is the rights of the parties, at the time the decree is rendered, that ought to govern the Court in rendering the decree" (*Randel vs. Brown*, 2 How., 406, 423). The appellants do not claim that the *Appam* would have departed after the announcement of the State Department's views, if she had not been held under legal process. They cannot make such a claim, because they expressly admit that the prize crew is "insufficient of itself to operate the ship" (Appellants' Brief p. 22).

The construction which the appellants now seek to put upon the Prussian treaty would be incompatible with this Government's neutrality toward the other belligerent powers. It would make the United States render an unneutral service to Germany by removing the disadvantage she suffers from England's superior sea power and by giving special privileges to Germany not enjoyed by the other belligerents.

In analogy to the principle that a statute is to be so construed, if possible, as to sustain its constitutionality, a treaty with any particular nation should be so construed, if its terms permit, as to make it consistent with

the obligations of the contracting parties toward other nations, whether by specific treaty or general international law. The interpretation of the treaty by the State Department and by the court below is consistent with the general law of nations, as shown by the provisions of Hague Convention XIII and by the general usage of the Powers. It is also the obvious and natural meaning of the language of the treaty. Any other construction would be equally violative of grammar and of international law.

The contention of the appellants that the commander of the *Möwe* sent the *Appam* here, relying in good faith on the privilege of asylum, which he claims was guaranteed by the treaty, and to avoid the unnecessary destruction of valuable property by sinking the vessel after her capture, is wholly inconsistent with the facts, which show that the actual motives and purposes of the German captors were wholly otherwise.

It is clear that an important purpose of sending the *Appam* to Newport News was to aid the *Möwe* in her raiding operations by keeping her activities secret as long as possible and that a further purpose was to use the *Appam* as a prison ship for the confinement of British subjects in American territory. Both of these purposes involved deliberate violations of this country's neutrality. This has already been pointed out in the statement of facts, but a further reference to it at this point is proper.

In January, 1916, the *Möwe* was operating as a commerce destroyer off the west coast of Africa. Prior to January 15th she had captured and sunk six or seven vessels and taken their crews on board as prisoners, to the number of 150 (Rec., page 26). The total crew of the *Appam* was 160 and her passenger list about 170.

When the commander of the *Möwe* captured the *Appam*, he was confronted with the problem of what to do with the prisoners, now aggregating nearly 500. The *Möwe* herself obviously could not accommodate them.

Further prisoners aboard would handicap her efficiency as a commerce raider, and to furnish subsistence for them would necessarily curtail her period of activity. She was within 150 miles of the Madeira Islands, and also, as will appear from any map of the region, not far from the Canaries, the latter belonging to Spain, then and still a neutral power. The prisoners might have been landed there in a day or two, but this fact would have at once become public and brought British cruisers speedily upon the scene.

For the *Möwe* to continue her operations successfully, it was imperative to find some way of disposing of these prisoners which could not come to the knowledge of the British Admiralty for a considerable period of time. The *Appam* had not resisted or attempted to escape, and there was thus no color of excuse for adopting the simple but barbarous expedient of sinking her with all on board. The ingenious plan was accordingly devised of putting the prisoners from all the captured vessels on board the *Appam* and sending her to the most remote neutral port to which her coal supply could take her at a slow rate of speed. By sending the *Appam* to Hampton Roads on an unfrequented route, the news of the *Möwe's* exploits was suppressed for more than two weeks. During this time the *Möwe* continued her career as a commerce raider and eventually returned to her home port.

It appears that after the *Appam* was captured, careful inquiry was made as to her coal supply and "the consumption for different speeds" (See Rec., page 36). These inquiries were repeated by Berg when he took charge. (Rec., page 37.) At the time of capture the *Appam* had 560 tons of coal aboard, and her average consumption per day was 65 tons at full speed. (Rec., page 36.) She proceeded to Hampton Roads under slow speed, consuming about 30 tons a day, and arrived with only 60 tons left. (See Rec., page 41.) She traveled in fourteen days approximately 3,000 miles at the rate

of about nine knots an hour. It is evident that her voyage was so planned as to keep the facts a secret for the longest possible time. She had to come to port some time. She could not, like the Flying Dutchman, cruise the seas forever. The selection of one of our ports was manifestly for the purpose of directly aiding German belligerent operations in the manner set forth.

The attempt to establish a German military prison in our waters was equally violative of our neutrality and even more amazing in its effrontery.

When the *Appam* arrived at Hampton Roads, she had on board more than 400 British subjects who had been held as prisoners under an armed guard during the trip across the Atlantic, and who were confined below decks on the night of arrival. (Rec., page 41.) An attempt appears to have been made to disguise or conceal this fact by removing the arms and the distinguishing badges of the guards upon arrival. The *Appam* arrived at Hampton Roads on February 1st, but the prisoners were not immediately released. On February 2nd the German Ambassador communicated with the Secretary of State, informing him of Berg's intention to remain in American waters until further notice, and requested "internment in the United States during the remainder of the war of a military party belonging \* \* \* to the enemy of Germany, and also the internment of the crew of the *Appam*, inasmuch as they offered resistance to capture by His Majesty's forces." (Rec., page 17.)

As the evidence shows, and as appellant's brief emphasizes, there was no resistance whatever, and this last representation was manifestly false. The Commander of the *Möwe*, and Berg, must have known that the prisoners would be released, as they were in the case of the *Farn* (*infra*).

Further details are given in the published Diplomatic Correspondence:

In the Note of the German Ambassador of February 2, 1916, it is said:

"She (the *Appam*) carries on board the crews of seven enemy vessels taken by H. M. S. *Moewe*, who have been transferred to her by that ship.

There is on board a locked-up military party of the enemy, whose internment in the United States I request."

(State Dept., Dipl. Corr. European War No. 3, p. 331.)

In the note of the Secretary of State to the British Ambassador, of February 3, 1916, he transmits a list

"of persons on board the *Appam* which the prize master asserts are in the military or naval services of His Britannic Majesty and whom he believes, therefore, should not be released from his vessel."

(*Id.*, p. 331.)

In the Memorandum from the German Embassy received by the State Department, February 8, 1916, this claim was made:

" 'Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to the English.' "

(*Id.*, p. 333.)

It appears from this correspondence that the German diplomatic representatives expressly claimed that the captors were entitled to "lay up" the *Appam*; that she was not subject to be interned; that both the vessel and her crew should be wholly free from any control or supervision by this Government, and that prisoners brought in on the vessel should be detained in captivity in American waters at the pleasure of the captors.

The officers, crew and passengers of the *Appam* were not released and did not leave the vessel until February 3rd. (See Rec., pages 27-28.) Their release was evidently effected pursuant to orders from the United States Gov-



ernment, as stated in Secretary Lansing's note of March 2nd, 1916, (Rec., page 19). It is thus the undisputed and indisputable fact that Berg brought into an American port more than 400 British subjects held as prisoners of war; that he kept them all in actual confinement there for a period of two days with the purpose and intention of making such confinement permanent as to some of them during the period of the war, and that he did this, not by mistake or inadvertence, but under a claim of right. A more egregious disregard of neutrality could hardly be imagined. Fortunately, the nation has been spared the spectacle of a German prison ship confining civilian British prisoners, lying at anchor under the guns of Fort Monroe, and thus protected against rescue by British cruisers.

The *Appam* was expressly claimed as a prize, and the German Ambassador certified that she had "not been converted into an auxiliary cruiser." (State Dept., Dipl. Corr. European War, No. 3, pp. 331, 333.) It accordingly cannot now be claimed that she was entitled to be treated as a "fleet auxiliary," similar to the *Farn* (*infra*) because she had prisoners aboard. She was not taking the prisoners to any place where she had a right to take them, or otherwise rendering any legitimate belligerent service against the enemies of Germany. She was operating solely against our neutrality.

It is quite immaterial that there was no notice to depart given by the United States Government. Such a notice might perhaps be necessary if the *Appam* had come in for temporary refuge under the circumstances recognized by international law as justifying such an entry. She did not do this. She came in to stay. There was a manifest intention to violate our neutrality from the time she headed westward. The whole proceeding was, as described by the court below, "one continuous occurrence." The violation was complete as soon as she entered our territorial waters. She thereby escaped

recapture by British cruisers, but she came under the operation of American law by her own free act. She has no rights whatever under the Prussian treaty and she comes within the purview of that rule of international law declared in article 22 of the Hague Convention. She must accordingly be released as a prize brought into a neutral port under circumstances other than those recognized as justifying such entry.

## POINT VI.

Complete title to a prize, whether neutral or belligerent, does not fully vest in the captor until the prize has been brought into one of the captor's ports and duly condemned by a competent Prize Court of the captor's country. Until such condemnation the prize may be lost by recapture, abandonment or violation of another nation's neutrality. The captor thereby loses whatever title he may have had.

There has been much discussion in regard to the time when title to a prize becomes fully vested in the captor. In the case of neutral prizes seized for breach of blockade or other sufficient reason, it has been uniformly held that condemnation by a prize court having jurisdiction is necessary, since the facts upon which the right of seizure depends cannot otherwise be officially established. As between belligerents, however, it has sometimes been claimed that title passed by the mere fact of capture; sometimes that "pernoctation," or twenty-four hours' firm possession, was requisite; sometimes, that bringing the prize into a place of safety or *infra praesidia* was necessary; and sometimes, that condemnation by a proper court having jurisdiction was essential. The rule last mentioned is the most modern and the best sustained by authority.

Title by capture rests purely on force, and is ob-

tained only by the successful exercise of an act of war. To constitute complete success in this respect, the prize must be brought into a place where abandonment or recapture becomes substantially impossible, and incorporated into the general mass of property of the captor's country. Such incorporation can only be officially declared by a proper sentence of condemnation.

Prior to such condemnation the captor has merely a right *ad rem* and no right *in re*; in other words, merely that limited right which possession gives until by condemnation *dominium* or plenary title is acquired (Amos, Roman Civil Law, p. 157). The origin of the recognition and protection of mere possessory rights in movables is "found in the general policy of recognizing rights while being actually exercised, so as to prevent violence and extra-judicial conflicts during the interval when the judgment of a court of law is being waited for" (*Id.* p. 158).

It is sometimes argued that the captor may sink a belligerent prize instead of taking her in for adjudication; that he does so by virtue of the ownership he has acquired in making the capture, and is thus simply destroying his own property, which he has a right to do; and from this right of destruction it is sought to infer the right of property on which it is claimed to be based. This reasoning is fallacious, and is an attempt to deduce a single cause from an effect which may be and is due to another cause. The proper view is, that the destruction of a belligerent prize is simply the completely successful exercise of an act of war which may be regarded by the law of nations as legitimate. Doubtless the time will come, in the development of international law and the growing respect for private property, when the destruction of prizes will be given up by the common consent of civilized nations. As matters stand at the present time, rights of property cannot be based upon the mere continued toleration of an abuse of belligerent powers.

There is considerable diversity among the early authorities on this question, much of which is seen to be only apparent if we keep in mind the distinction between a *full property right (dominium)* and that limited right to the thing possessed that is acquired with possession.

Grotius said in Liber 3, Chapter 6, section 3, note 3:

"Things are considered as captured when they are brought within the boundaries, or *intra praesidia*, under the protection of the enemy."

. . .

"Whence it seems to follow that at sea, ships and other things captured are understood to be captured when, and not till, they are brought into dock or harbour, or to the place where the fleet is; for then recovery becomes desperate. But we find that it has been established by the more recent law of nations among Europeans that such things are understood to be captured when they have been twenty-four hours in the possession of the enemy."

In *Bynkershoek's Treatise on the Law of War*, Du Ponceau's Translation, Chap. 5, p. 41, this view was expressed:

"What the enemy has taken on the high seas, at a great distance from his territory, he may lose and often loses by recapture. If he carries what he has taken into his own ports and territory, no one can doubt that it has then become his absolute property. I would say the same if he carried it into the port of a neutral or of an ally, but, if this, as I said before, cannot be admitted, I must grant that whatever is taken at sea, is to be carried into the captor's own port or fleet, and that it cannot be until then considered as fully his."

In *Burlamaqui, Principles of Politic Law*, Part 4, Chap. 7, sections 15-18, the author concludes, after discussing the subject at length, that the test of the pass-

ing of title to prizes is the loss of the hope of recovery, but says:

"I see no reason why the prizes taken from the enemy should not become our property so soon as they are taken."

*Richard Lee*, in his *Treatise of Captures in War*, expresses both views. He says at p. 82:

"Prizes taken from the enemy certainly become the property of the captors so soon as taken, for when two nations are at war, both of them have all the Requisites for the Acquisition of Property at the very moment they take a Prize."

And at p. 96:

"There cannot be such an adjudication of the capture in such a Port (friend or ally) as to give the captor a possession in full right; therefore, whatever is taken at sea must be brought into the Captor's own Port, or into their own Fleet, or place of security, for a full property is not obtained in them before. So that if they are retaken before they are so brought into the safe custody of the captor, the former owner may claim them; as no property therein has yet been vested in the enemy, and therefore not transferred to the recaptor, I say *former* because some kind of use, though not sufficient to confer a full Right, hath intervened."

The weight of authority in England supports the necessity of a condemnation, or at least of bringing the prize into a home port.

In *Goss v. Withers*, 2 Burrow's Rep. 638, Lord Mansfield speaks of having examined the practice of the Court of Admiralty and finding that

"They held the property not changed, so as to bar the owner in favor of a vendee or re-captor till there had been a sentence of condemnation."



In *Assievedo v. Cambridge*, 10 Mod. 77, it appears to have been held that 24 hours' possession was not sufficient to vest title in the captor if the prize was not brought *infra praesidia*.

In *March's New Cases*, at p. 110, it is said:

"If a ship be taken by piracy or if by letters of Mart and be not brought *infra praesidia* of that King by whose subject it was taken, that it is no lawful prize and the property not altered and therefore the sale void."

In *Wooddeson's Lectures*, vol. 2, p. 274, the author says:

"But the property is not completely vested so as to bar the former owner in favor of a rescuer or vendee, in case of recaption or sale, till there has been a sentence of condemnation in some foreign or domestic Admiralty Court."

In the *Flad Oyen*, 1 C. Rob., 135 (1799), Lord Stowell—then Sir William Scott—held that according to the general practice of nations a sentence of condemnation was necessary to transfer the property in prize, and that a condemnation by a prize court set up in neutral territory was insufficient.

The American rule requires that the captured vessel be brought within the jurisdiction of the captor's country in order to divest the title of the original owners, and that a sentence of condemnation must be duly pronounced by a competent court.

The necessity of bringing the captured vessel within the captor's jurisdiction was expressed in an opinion of Charles Lee as Attorney General, rendered Dec. 19, 1797, reported in 1 Op., 78.

In *Stewart v. United States*, 1 Court of Claims, 113, at p. 119, the Court said:

"The property of the original owner cannot be considered as fully divested until there has been

a condemnation by a regular prize tribunal having jurisdiction of the subject-matter. Until such adjudication is made, the right of recapture continues, as well as the right of *postliminii*. And in case the captured vessel escapes, is recaptured, or is voluntarily discharged, the jurisdiction of the prize court is lost, and all rights acquired by the capture are divested. (1 Kent's Com., 359.)"

In the *Manila Prize Cases*, 188 U. S., 254, the Supreme Court said (p. 260):

"Ordinarily, the property must be brought in for adjudication, as the question is one of title which does not vest until condemnation."

Upon condemnation "the right attaches as of the time of the capture" (p. 278), but until then the right either of the individual captors or of the government is inchoate, and may be lost or given up, voluntarily or involuntarily, as the case may be.

See also:

*Miller v. The Resolution*, 2 Dallas, 1.  
*The Nassau*, 4 Wall., 634, 641.

A very clear light upon the situation with which the Court is called upon to deal in this case is thrown by the language of the Supreme Court in the case of *The Adventure*, 8 Cr., 221:—

The *Adventure* was a British vessel that had been captured by two French frigates. Part of the cargo having been taken out, the *Adventure* was duly presented to the American crews (then neutral) of two vessels which the frigates had just taken and burned. The *Adventure* was thereupon navigated by her donees to Norfolk, where she arrived on the 1st of October, 1812, and where she was promptly libelled by the acting captain and crew as their property acquired under the donation of the French captor. The United States interposed a claim for forfeiture

under the Non-Importation Act. At the time of her arrival, peace existed between this country and Great Britain; but on the 18th of June following, and pending the suit, war was declared between the last-named countries. The Supreme Court by Johnson, J., said:

“The very peculiar circumstances of this case require the application of a variety of principles; and the court has not been aided in its inquiries, by that elaborate discussion which such novel cases generally elicit. But they are relieved by the reflection, that the principles to which they must resort in forming their judgment are well established, and lead satisfactorily to a conclusion.

The most natural mode of acquiring a definite idea of the rights of the libelants in the subject-matter, will be to follow it through the successive changes of circumstances by which the nature and extent of the rights of the parties were affected. The capture, the donation, the arrival in the United States, and the state of war.

As between the belligerents, the capture undoubtedly produces a complete divesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority and not mere individual outrage. \* \* \* Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. *He could be in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander.* The vessel remained liable to British capture on the

whole voyage. And, on her arrival in a neutral territory, *the donee sunk into a mere bailee for the British claimant*, with those rights over the thing in possession which the civil law gave for care and labor bestowed upon it.

The question, then, occurs, is this a case of salvage?

On the negative of the proposition it is contended that it is a case of forfeiture, and therefore not a case of salvage as against the United States—that it was an unneutral act to assist the enemy in bringing the vessel *infra presidia*, or into any situation where the rights of recapture would cease, and therefore not a case of salvage as against the British claimant.

But the Court entertain an opinion unfavorable to both these objections.

This could never have been a case within the view of the legislature, when passing the Non-Importation Act. The ship was the plank on which the shipwrecked mariner reached the shore; and although it may be urged that bringing in the cargo was not necessarily connected with their own return to their country, yet, upon reflection, it will be found that this also can be excused upon very fair principles. It was their duty to adhere strictly to their neutral character; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury by taking away that chance of recovery subject to which they took it into their possession. Besides, bringing it into the United States did not necessarily presuppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as we are of opinion it did, legal provision exists for disposing of it in such a manner as would comport with the policy of our laws. At last, they could but deliver it up to the hands of the government, to be reshipped by the British claimant, or otherwise appropriated

under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the country, upon their arrival here they deliver it up to the custody of the laws, and leave it to be disposed of under judicial sanction. The case has no one feature of an illegal importation, and cannot possibly have imputed to it the violation of law.

As to the question arising on the interest of the British claimant, it would, at this time, be a sufficient answer, that they who have no rights in this court, cannot urge a violation of their rights against the claim of the libellants. But there is still a much more satisfactory answer: To have attempted to carry the vessel '*infra presidia*' of the enemy, would, unless it could have been excused on the ground of necessity, have been an unneutral act. But when every exertion is made to bring it to a place of safety, *in which the original right of the captured would revive and might be asserted*, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the English claimant."

Having determined the case to be one of salvage, the court, after fixing the amount to be allowed, proceeded:

"The next question arises on the application of the residue. On this point, the court is led to a conclusion by the following considerations:

*At the arrival of the vessel in the United States, the original British owner would, unquestionably, have been entitled to the balance.* The state of war, however, at present, prevents his interposing a claim in the courts of this country. But as this property was found within the United States at the declaration of war, it must stand on the same footing with other British property similarly situated."

It seems quite clear from the language of this decision that in the present case, even assuming that the capture,



of itself, divested their property, leaving only a *spes recuperandi*, all the rights of the British owners of the *Appam* and cargo were revived the moment the *Appam* was brought by the prize-master into our neutral waters.

If as between the German Empire and the British owners of the *Appam* the capture of the *Appam* by the Germans produced such a complete divesture of property as to make unnecessary the decree of a competent prize court, and if the commander of the *Möwe*, instead of sending the *Appam* to Norfolk in charge of a prize-master, had presented her to Americans, who subsequently brought her into Norfolk, then, as said in *The Adventure* (*supra*), upon her arrival in our neutral territory the donees would sink into mere bailees for the British owners, with such right of salvage in the thing in their possession as our admiralty law might give for the care and labor bestowed by the donees upon it in bringing it to a port of safety. The donees would be "in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander."

In the case at bar we have a case of a prize-master navigating the prize into our port in pursuance of orders from his commander, contrary to the obligations of international law (under which the *Appam* should have been taken into a German port) and under the unfounded claim that the treaty with Prussia applied to such a case. In so doing it is clear, under the last-cited case, that unwittingly the prize-master was "doing an act exclusively resulting to the benefit of the English claimant."

The modern doctrine as to the vesting of title is admirably summed up by Mr. Pitt Cobbett in his *Leading Cases on International Law*, published in 1913 (pp. 204-5), as follows:

"In the case of neutral property taken as a prize, notwithstanding that the captor acquires immediate possession, the title of the owner will not be regarded

as completely divested unless and until a decree of condemnation has been passed, although in that event the divestment of title will date back to the original seizure. In the case of the property of subjects or allies taken as prize, as for illegal trading, the same principle would apply. In the case of enemy property, it is commonly laid down that as between captor and owner the divestment of title is complete as from the date of the original seizure; but in view of the fact that the captor is here, too, legally bound to proceed to adjudication and that the result of such adjudication may conceivably be in favor of the owner, it would seem that the same principle now applies to enemy property. If this be so, then we have a uniform rule with respect to title and its divestment, as between the captor and the original owner, whether enemy or neutral.

In the case where a captor loses possession of his prize before condemnation, either by abandonment or by recapture or rescue, then his inchoate right comes to an end. As regards abandonment, if this is voluntary and intentional, there can clearly be no further claim on his part, and the right of the original owner will thereupon revert, subject to any claim of salvage or new capture. In principle it would appear that the same rule should apply where the abandonment of the prize by the captor was involuntary, for the reason that his title is merely possessory, and dependent on the retention of control, either actual or constructive. In cases of rescue, and now also on recapture, the right of the original owner will revert, although subject to any lawful claim of salvage. But if, after recapture, the prize should be taken anew by the enemy, then the title will vest in the last captor, to the exclusion of any claim on the part of the original captor."

From a practical standpoint, it is immaterial for the purposes of the present discussion whether title to a belligerent prize vests upon capture or not until adjudication, although the anxiety manifested by the German Ambassador and the diligence exercised by the German authorities in the matter of the institution of prize proceedings in Germany clearly indicate that they believed condemnation to be a prerequisite to the complete vesting of title.

Between capture and adjudication a belligerent vessel captured is in the category of "prize" and is subject to the rules, regulations and limitations applicable to this class of vessels. She is not a public armed vessel or a merchantman of the capturing belligerent. She is simply a prize not yet adjudicated.

It has already been demonstrated that when an uncondemned prize is brought into a neutral port under circumstances other than those expressly recognized as permissible she must be restored to the private owners whose possession has been temporarily displaced by the capture. This is the law and this is the practical result.

Any academic discussion as to the technical status of the bare legal title to the vessel between the capture and the restitution is beside the mark. The *Appam* is a prize; that is all sufficient for the purposes of this suit.

In any event, as held by the Supreme Court in the case of *Santissima Trinidad*, 7 Wheaton, at page 355, the pendency of prize proceedings in a foreign court cannot be set up against the jurisdiction of our courts to deal with a *res* actually in their custody.

The case of the *Mary Ford* (3 Dall., 188), upon which appellants lay so much stress (Appellants' Brief, p. 23) is not a controlling authority. There was no opinion rendered by the Supreme Court, but merely a very brief memorandum affirming the result of the decision in the Circuit Court. This decision was rendered in 1794, when the whole law of prize was in a very unsettled condition. The conclusion reached is entirely incon-

sistent with the later decision in the case of *The Adventure* (*supra*), which must be regarded as overruling *pro tanto* the earlier decision.

In the cases of the *Josefa Segunda* (5 Wheat., 338) and the *Sally Magee* (3 Wall., 451), there was evident collusion and an attempt to evade the laws of the United States.

The claim that title to a belligerent prize vests absolutely and indefeasibly by the mere fact of capture, in the same sense that title to land vests upon a lawful purchase and conveyance, cannot be sustained.

## POINT VII.

**The Appam is not a German public vessel or entitled to the exemptions of a public vessel.**

The classification of vessels into public and private is not complete and exhaustive. A proper classification is rather as follows:

1. Private vessels:

- (a) Merchant vessels.
- (b) Yachts.

2. Public vessels:

- (a) Warships.
- (b) Government ships used for peaceful purposes, as for example, lighthouse tenders, revenue cutters, and the like.

3. Prizes.

The *Appam* was avowedly in the category of prize. She was claimed in the answer of the respondents as

"prize of war" (Rec., p. 3). On February 2, 1916, the German Ambassador wrote to the Secretary of State:

"The *Appam* has not been converted into an auxiliary cruiser, is not armed and has made no prize under Mr. Berg's command." (State Dept., Dipl. Corr. European War No. 3, p. 331.)

A Memorandum from the German Embassy received by the Department of State, February 8, 1916, states:

"*Appam* is not an auxiliary cruiser but a prize. Therefore, she must be dealt with according to Article XIX of the Prusso-American Treaty of 1779." (*Id.*, p. 333.)

A Note from the German Embassy of February 22, 1916, says:

"The *Appam* was \* \* \* brought to the Virginian port as a prize ship." (*Id.*, p. 334.)

An uncondemned prize stands in a category by herself. She may, after condemnation, be sold to a private purchaser and become a private vessel under new ownership, or she may be appropriated to public uses, pacific or belligerent. She may, in certain exceptional cases, be converted into a public vessel even before condemnation. But to effect this she must be regularly commissioned as such by some competent authority. She may then become entitled to the exemptions of a public vessel. This was done in the case of *The Exchange* (7 Cranch., 116), and it was on this specific ground that *The Exchange* was held not to be subject to the jurisdiction of our courts.

So, in the case of *The Farn*, referred to by the appellants at page 33 of their brief, it appeared that she had been in the possession of the captor for more than



three months, and used as a fleet auxiliary or tender, and was officered and manned by Germans. For this reason she was treated by the United States Government as an "auxiliary to a belligerent fleet." She had put in at San Juan, Porto Rico, on January 12th, 1915, "for provisions and water," a permitted purpose. On or about January 22nd, she was ordered to leave within twenty-four hours, and failing to do so she was interned on January 25th. The original request of the British Ambassador, made on January 13th, was for "the detention of this vessel in the interests of a proper observance of neutrality." Apparently no steps were taken by the original owners. (See State Dept., Diplomatic Correspondence, European War, No. 2, pp. 139, 140.)

In like manner, in the case of *The Tuscaloosa*, discussed by the appellants on pages 66 and 67 of their brief, she was restored expressly on the ground that she had been commissioned as a ship of war, and converted into a tender to the *Alabama*. (See Semmes, *Memoirs of Service Afloat*, pp. 739-743.)

In the "Geneva Award," whereby the "Alabama claims" were disposed of, the tribunal determined as follows:

"And so far as relates to the vessels called *The Tuscaloosa* (tender to the *Alabama*), *The Clarence*, *The Tacony*, and *The Archer* (tenders to *The Florida*),

The tribunal is unanimously of opinion—

That such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively."

(Molloy, *Treaties, &c.*, 1776-1909, Vol. 1, p. 721.)

In general, the experience of Admiral Semmes demonstrated that it was the universal rule of neutral powers to exclude prizes, or to restore them for violations of neutrality. In 1861, when commanding the *Sumter*, he took several prizes into a Cuban port, and asked that Spain would permit him "to leave the captured vessels within her jurisdiction, until they can be adjudicated by a Court of Admiralty of the Confederate States" (Semmes, *Memoirs of Service Afloat*, p. 139). This request was refused, and as Semmes says:

"My prizes were delivered—to whom, do you think, reader? You will naturally say, to myself or my duly appointed agent, with instructions to take them out of the Spanish port. This was the result to be logically expected. The Captain-General had received them in trust, as it were, to abide the decision of his Government. If that decision should be in favor of receiving the prizes of both belligerents, well; if not, I expected to be notified to take them away. But nothing was further, it seems, from the intention of the Captain-General, than this simple and just proceeding, for as soon as the Queen's proclamation was received, he deliberately handed over all my prizes to their original owners" (*Id.*, p. 141).

He found that Great Britain and France, as well as Spain, excluded prizes (*Id.*, pp. 100, 133), and so did Brazil and the South American Republics (*Id.*, pp. 161, 162), and he sums up his experience in this matter by saying (p. 386):

"In short during my whole career upon the sea, I had not so much as a single port open to me into which I could send a prize."

It is not to be supposed that International Law has gone backward or that the obligations of neutrality

have diminished, since the days of the *Sumter* and the *Alabama*.

Nothing whatever has been done to take the *Appam* out of the category of prize, and convert her into a public vessel, or devote her to public use. She *would* not, as a German public vessel, bring several hundred prisoners to the United States for the purpose of setting them free. She *could* not bring them here to hold them as prisoners in our territorial waters without manifestly violating our neutrality, as she in fact did in this respect. She was and is a prize, and nothing but a prize, and having violated our neutrality, she is subject to restitution.

If the *Appam's* crew should be augmented so as to be able to take the vessel to a German port, they would constitute a military expedition bringing in the spoils of war. But that would not constitute the *Appam* herself a public ship until condemnation and conversion, and this fact does not make the *Appam* "subject to the disabilities of a ship of war," as claimed by appellants (brief, p. 57), and hence "entitled to the immunities incident to that character." *She* is not under the disability; it is her crew who are under the disability, due to the express prohibition of the American statutes against organizing "any military expedition or enterprise to be carried on from thence [the United States] against the territory or dominions of any foreign prince or state, or of any colony, district or people with whom the United States are at peace" (U. S. Rev. Stat., sec. 5286). To hold and then bring in the spoils of war is certainly a military enterprise against the dominions of the power from whom the spoils were taken, and our statute expressly condemns "any person who within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for" any such enterprise.

The neutrality regulations applicable to the Panama Canal Zone, referred to by appellants (brief, p. 56), do not recognize prizes as public vessels analogous to vessels of war. These regulations merely provide that in passing through the Canal prizes shall be subject to the same restrictions as war vessels. In other words, a prize may be sent through the Panama Canal, but, while passing through, she must do and refrain from doing the same things as a war vessel. This does not constitute a recognition of prizes as public vessels. Moreover, such use of the Canal is necessarily temporary.

The case of the *Sitka*, discussed by the appellants at pages 64 and 65 of their brief, is not in point. There the prize was under the direct convoy of an armed public vessel. She came into San Francisco Bay in company with a war vessel. She came in temporarily and not to lay up, and she was able to and did sail out again without delay. The question discussed by the Attorney General arose on a complaint by the Governor of California to the President that a writ of *habeas corpus* issued by a California court to inquire into the detention of certain prisoners on board the prize had been disregarded by the prize master, who sailed away after the writ had been served upon him. The Attorney General's ruling was, in essence, merely that the immunity of the war vessel extended to the prize which was in her company, and that the prize master's disregard of the writ of the California court was not an affront to the United States. No question of violation of neutrality appears to have been involved or discussed.

It is also to be observed that the Attorney General said (7 Op., 122):

"The United States might, if they pleased, exclude prizes of war from their ports, either absolutely or under qualification, in favor of cases of

mere distress or previous condemnation or non-accessibility of any port of the belligerent power itself, but the United States have not, in fact, done this, and the faculty of doing it is a political one and foreign to the powers and duties of the courts, whether of the states or of the United States."

This is exactly what has since been done by the proper Department of the United States, when the Senate expressly rejected Article 23 of the Hague Convention XIII and acceded to Articles 21 and 22, thus proclaiming to the world that it was the policy of the United States to admit prizes of war only "under qualification, in favor of cases of mere distress," as phrased by the Attorney General, but otherwise to exclude them.

If prizes still uncondemned were public vessels, the whole Hague Convention on the subject, and the jurisprudence of this court in such cases from the "*Betsey*" down, would be mere absurdities.

#### POINT VIII.

The sending of a prize to a neutral port with a prize crew insufficient to navigate her, and with intention to lay her up, is equivalent to an abandonment and thereby divests the captors' inchoate right.

Appellants expressly admit that the prize crew is "insufficient of itself to operate the ship" (appellants' brief, p. 22). The prize master and crew, therefore, cannot take the *Appam* out and navigate her safely to a German port. Through their own act in bringing her into an American port they necessarily lost the services of her own officers and crew, who had previously, under compulsion, made her operation possible. They could not hold them on the *Appam* as prisoners of war, working under continued compulsion, without violating



American neutrality, and the *Appam's* own officers and crew were accordingly released by order of this Government.

As already pointed out, the prize crew cannot be augmented here without violating the provisions of the American neutrality laws, as this would constitute the organization of a military expedition having for its object the transportation of an uncondemned prize to the captor's country for adjudication. It has also been shown that, under general international law, no valid adjudication can be rendered by the courts of the captor's country while the prize is still outside of that country's jurisdiction.

In contemplation of law, therefore, the *Appam* is just as effectually abandoned as if the prize master and crew had taken to the boats and rowed away. They cannot hold her in one of our ports as a place of safe-keeping without violating our neutrality. They cannot take her away without violating our neutrality. Their mere physical presence on the vessel, therefore, does not constitute lawful possession, and she must be regarded as abandoned.

To hold a capture merely by putting on board a prize master, with or without a small crew, the prize master must actually bring the prize into a home port for condemnation. This was the doctrine of *The Alexander*, 8 Cranch, 169, referred to by appellants on page 22 of their brief. There the vessel was actually brought into an American port by the American prize master and then successfully proceeded against in the American courts.

It is the actual bringing of the prize into a port of the captor's country, or, in the language of the old cases, *infra praesidia*, which demonstrates the sufficiency of the possession. Unless and until this is done, possession, in order to be effective, must be such as to enable the captor to operate the vessel, either with his own crew or with the original crew working under his orders.

The general rules are well laid down in an early case in Pennsylvania:

*Wilcocks et al. v. Union Ins. Co.*, 2 Binney 574,  
at p. 578.

This was an action on a marine insurance policy, and the question was whether there had been a total loss by capture. Chief Justice Tilghman charged the jury as follows:

"As to the duty of the crew, they are not obliged to navigate the vessel; the captors therefore should take care to put sufficient force of their own on board. Should they send but a single hand, or so few that it was manifestly impossible to work her, this would not be taking sufficient possession. In that case the neutrals are not obliged to submit their property and lives to the mercy of the winds and waves, and may lawfully consider her as abandoned to them, and act accordingly. But if a force insufficient to work the vessel is put on board by the captors, in consequence of the promise of the neutral crew, to navigate her to the destined port, they are bound by such promise, and must be considered, for the purpose agreed on, as the hands of the captors. If, in violation of their promise, they take the vessel into their own hands, I am of opinion that it is an unlawful rescue."

In 1838 Attorney General Grundy rendered an opinion (3 Op. 377) in which he said:

"By the well settled principles of international law, it is made the duty of the captors to place an adequate force upon the captured vessel; and if from a mistaken reliance on the sufficiency of their force, or misplaced confidence they fail to do so, the omission is at their own peril."

Under the prize laws of the United States, the failure to bring proceedings with due diligence in a competent court for an adjudication of prize is in itself ground for the release of the vessel.

See:

*U. S. Rev. Stat.*, sec. 2645.

In like manner, the German Prize Code provides for the bringing of proceedings for condemnation in due season. As already shown, in order to make such proceedings internationally effectual, the *res* must be within the actual jurisdiction of the court. Here the *res* is in the custody of our Court, and the pendency of proceedings in a German prize court is mere *brutum fulmen*, under the decision in the *Santissima Trinidad*, 7 Wheat., at p. 355.

The captors of the *Appam* having themselves put it out of their own power to bring the vessel within the jurisdiction of a German prize court and subject her to adjudication, they must be deemed to have abandoned her, and she should accordingly be restored to her owners by analogy to the practice of American prize courts as above indicated.

The insufficiency of the German prize crew does not constitute "unseaworthiness," as the term is used in international law, and, especially in Article 21 of the Hague Convention, and the claim to this effect set up in appellants' answer (Rec., p. 8) is both unsound and disingenuous. The existing conditions in this respect have been caused by their own acts. They cannot thus voluntarily render her unable to go to sea and then claim the benefit of such self-imposed "unseaworthiness."

There is no inconsistency between the theory of violation of neutrality and the theory of abandonment, as claimed by appellants (brief, p. 23). The two theories are alternative. Either the German government intended to violate our neutrality by making an American port a place of depot or a recruiting station, or they, in effect, abandoned the prize. In either case the same result of restitution to the owner follows as the legal consequence.

## POINT IX.

**Restitution to the owner is the appropriate and only adequate remedy.**

The appellants contend with much show of earnestness that even if there has been a violation of neutrality by the German captors, or an abandonment of the vessel, nevertheless, restitution to the owner should not be awarded (appellants' brief, pp. 42-54). In support of this argument, they set up a man of straw and then proceed to demolish him. They say, at page 43:

"If the mere bringing of a prize into our waters required restitution, then in every such case restitution would be ordered and inquiry into the circumstances of the capture would be unnecessary."

Nothing of the sort has been claimed. It is recognized that a prize may be brought in temporarily for repairs or provisions or to escape stress of weather. The inquiry to be made by our courts is whether the prize was brought in for these permitted purposes, and, if so, whether she remains longer than her necessities require. If she acts otherwise, then she is, in the language of the Hague Convention, to be "released." If released, she must necessarily revert to her owners, since the temporary adverse possession of the captors is thus removed. This, however, was no new invention of the Hague Conference. Its roots go back at least to the edict of the States General of Holland of 1658, already cited, which expressly provided that, in such event:

"The prize should be restored to the former owners as though it had never been taken."

In the *Consolato del Mare*, first printed in 1494, but of much earlier origin (Benedict's Admiralty, Sec. 119) it was provided that in cases of the recapture or abandonment of prizes, the recaptors or salvors should not be entitled to the vessel (except where the recapture was

"effected within the enemy's territories, or in a place where the enemy was in entire possession of his prize") and that "the vessel, and all that is in her, shall be restored to the former proprietors, or payment of a reasonable salvage." See 5 Wheat., Appendix, pp. 56-58.)

This shows conclusively that under international law, both ancient and modern, the mere fact of capture does not vest an indefeasible or complete title in the captors.

In all cases where a prize in a neutral port has been taken away from her captors by either executive or judicial action, she has invariably been restored to her owners and not interned. If in such circumstances a prize were interned, the question would immediately arise: To whom should she be delivered upon the conclusion of the war? This very pertinent question was put by the British Ambassador to the Secretary of State, in a note of March 26th, 1915, in regard to the *Farn*. It does not appear what answer, if any, has been made to this enquiry, and the question may well prove a troublesome one at the end of the war.

See *Dept. of State, Diplomatic Correspondence, European War, No. 2, p. 141.*

It is inconceivable that a belligerent should be allowed to keep his spoils of war in one of our ports; that the only control which our government can exercise is "to determine how long and upon what conditions" this may be done (appellants' brief, p. 117); and that there should be no remedy either to the ousted owners through the courts or to the injured belligerent through the executive. If internment were the only remedy, the captor's chief purpose, of securing a place of safe keeping for his spoils, would be accomplished. Moreover, the German Government has expressly disclaimed and objected to internment in this case (see *ante*, p. 79).

The executive department held in regard to this case that the court had rightfully taken jurisdiction and could retain it until a determination of the controversy. It only remained for the court to apply and enforce the law



and vindicate our neutrality by awarding restitution, and this the court below did. That such restitution is made by court decree rather than by executive action is the result of the historic development of our judicial and diplomatic precedents. The remedies are concurrent; neither excludes the other; but for many years it has been the policy of this government to leave such questions to the courts rather than to dispose of them summarily by executive action (see Chief Justice Marshall's opinion in the *Santissima Trinidad*, in the Circuit Court, *ante*, p. 58). Whatever diplomatic recourse may have been, or may still be, open to the British Government, the proper remedy for the owners was in the courts. They were within their rights in invoking this remedy and they are entitled to the relief which the court below awarded.

#### Recapitulation and Summary.

1. By deliberately sending the *Appam* to an American port, twice as far away as the nearest German port, with instructions "there to lay up," the captors wilfully violated American neutrality.

2. By attempting to use an American port as a place of depot for the spoils of war, the captors wilfully violated American neutrality.

3. By attempting to use an American port as a place for the confinement of prisoners of war, the captors wilfully violated American neutrality.

4. By sending the *Appam* to an American port to keep secret as long as possible and thus aid the operations of the commerce raider *Möwe*, the captors wilfully violated American neutrality.

5. The *Appam's* entrance into an American port in the circumstances shown in this case was a violation of American neutrality, since she was not driven in by unseaworthiness, stress of weather or lack of fuel or provisions.

6. Any shortage of fuel or provisions when she entered was caused by the voluntary act of her captors in taking her across the Atlantic instead of proceeding half the distance to a German port.

7. Irrespective of the character of her entrance, the *Appam's* detention after a reasonable time to supply any shortage of fuel or provisions violated American neutrality. Such "reasonable time" expired before the filing of the libel.

8. The Prussian treaty did not justify the *Appam's* entry or her detention. She did not come in under convoy of a public armed vessel or for temporary refuge.

9. The provisions of Articles 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of accepted international law. Under the rules of international law embodied in these provisions, the *Appam* must be released to her owners.

10. The rejection by the United States of Article 23 of the Hague Convention was notice to the world that the United States would not admit prizes except under the circumstances specified in Article 21.

11. There was no necessity for a notice to the *Appam* to depart, because she did not come in for a permitted purpose, and in any event her prize crew were insufficient to take her out.

12. The title of the *Appam's* owners was not divested by the capture. The captors acquired only a temporary right of possession and an inchoate title, which they have lost by violating American neutrality and by abandonment.

13. Irrespective of the question of title, the *Appam* is in the category of prize, and, as an uncondemned

prize, is subject to restitution for violation of neutrality.

14. The act of bringing in the *Appam* with a prize crew insufficient to take her out again and navigate her safely to a German port constitutes an abandonment.

15. Upon a termination of the captors' rights, either by abandonment or by executive or judicial release for violation of neutrality, the prize must be restored to her owners.

16. Restitution should be awarded for any violation of neutrality in connection with the prize, whether in the captor's character or in the capture itself or in the captor's conduct subsequent to the capture.

17. The questions presented in this case are justiciable and the court below properly exercised its jurisdiction to determine them and to award restitution of the *Appam* and her cargo to their respective owners under the law of nations as accepted, recognized and applied by the United States.

### CONCLUSION.

The decrees appealed from should be in all respects affirmed with costs and the mandates should issue immediately upon the decision, so that the decrees may be carried into execution and actual possession delivered to the owners without further delay.

Respectfully submitted, this 2nd day of January, 1917.

FREDERIC R. COUDERT,  
HOWARD THAYER KINGSBURY,  
JAMES K. SYMMERS,  
HERBERT BARRY,  
FLOYD HUGHES,  
RALPH JAMES M. BULLOWA,  
Counsel for Appellees.

## APPENDIX A.

## Treaty Provisions.

(8 *U. S. Stat.*, pp. 172, 173.)

## Treaty with Prussia, 1799.

## Article XIX.

The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty or of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew. But conformably to the treaties existing between the United States and Great Britain, no vessel, that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests or any other danger, or accident of the sea, they shall be

## FRENCH TEXT.

## Article XIX.

Les vaisseaux de guerre publics et particuliers des deux parties contractantes pourront conduire en toute liberté partout où il leur plaira, les vaisseaux et effets qu'ils auront pris sur leurs ennemis, sans être obligés de payer aucuns impôts, charges ou droits, aux officiers de l'amirauté, des douanes ou autres. Ces prises ne pourront être non plus ni arrêtées, ni visitées, ni soumises à des procédures légales en entrant dans le port de l'autre partie, mais elles pourront en sortir librement, être conduites, en tout temps par le vaisseau preneur aux endroits portés par les commissions, dont l'officier commandant ledit vaisseau sera obligé de faire montre. Mais conformément aux Traités subsistants entre les Etats-Unis et la Grande Bretagne, tout vaisseau qui aura fait une prise sur des sujets de cette dernière puissance, ne saurait obtenir un droit d'asile dans les ports des

obliged to depart as soon as possible.

Etats-Unis et s'il est forcé d'y relâcher par des tempêtes ou quelque autre danger ou accident de mer, il sera obligé d'en repartir le plutôt possible.

**Treaty with Prussia, 1828.**

Article XII.

The twelfth article of the treaty of amity and commerce, concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to the treaties with Great Britain, are hereby, revived with the same force and virtue, as if they made part of the context of the present treaty; it being, however, understood that the stipulations contained in the articles thus revived, shall be always considered as in no manner affecting the treaties or conventions concluded by either party with other powers during the interval between the expiration of the said treaty of 1799, and the commencement of the operation of the present treaty.

The parties being still de-

Article XII.

FRENCH TEXT.

L'article douze du traité d'amitié et de commerce, conclu entre les parties en 1785; et les articles 13 et suivans, jusqu'à l'article vingt-quatre, inclusivement, du traité conclu à Berlin, en 1799, en exceptant le dernier paragraphe de l'article dix-neuf, touchant les traités avec la Grande-Bretagne sont remis en vigueur, et auront la même force et valeur que s'ils faisaient partie du présent Traité; il est entendu cependant que les stipulations contenues dans les articles ainsi remis en vigueur, seront toujours censés ne rien changer aux Traités et Conventions conclus de part et d'autre, avec d'autres puissances, dans l'intervalle écoulé entre l'expiration dudit Traité de 1799, et le commencement de la mise en vigueur du présent Traité.

Les Parties Contractantes désirant toujours



sirous, in conformity with their intentions declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime powers, further provisions to ensure just protection and freedom to neutral navigation and commerce, and which may, at the same time, advance the cause of civilization and humanity, engage again to treat on this subject, at some future and convenient period.

conformément à l'intention déclarée dans l'Article douze dudit Traité de 1799, pourvoir, entre Elles, ou conjointement avec d'autres Puissances Maritimes, à des stipulations ultérieures qui puissent servir à garantir une juste protection et liberté au commerce et à la navigation des neutres, et à aider la cause de la civilisation et de l'humanité, l'engagent ici, comme alors à concerter ensemble sur ce sujet, à quelque époque future et convenable.

**Treaty with Sweden, 1783.**

*Qd. p. p. 72, 73.*

**FRENCH TEXT.**

**Article XIX.**

The ships of war of his Swedish Majesty and those of the United States, and also those which their subjects shall have armed for war, may with all freedom conduct the prizes which they shall have made from their enemies into the ports which are open in time of war to other friendly nations; and the said prizes upon entering the said ports shall not be subject to arrest or seizure, nor shall the officers of the places take cognizance of the validity of the said

**Article XIX.**

Les vaisseaux de guerre de sa Majesté Suédoise et ceux des Etats Unis, de même que ceux que leurs sujets auront armés en guerre, pourront, en toute liberté conduire les prises qu'ils auront faites sur leurs ennemis, dans les ports ouverts en tems de guerre aux autres nations amies, sans que ces prises, entrant dans les dits ports, puissent être arrêtées ou saisies, ni que les officiers des lieux puissent prendre connoissance de la validité de dites prises, les quelles

prizes, which may depart and be conducted freely and with all liberty to the places pointed out in their commissions, which the captains of the said vessels shall be obliged to shew.

pourront sortir et être conduites franchement et en toute liberté aux lieux portés par les commissions, dont les capitaines des dits vaisseaux seront obligés de faire montre.

### Treaty with Great Britain, 1794.

#### Article XXV. (Ed. p. - 128.)

It shall be lawful for the ships of war and privateers belonging to the said parties respectively, to carry withersoever they please, the ships and goods taken from their enemies, without being obliged to pay any fee to the officers of the Admiralty, or to any Judge whatever; nor shall the said Prizes when they arrive at, and enter the ports of the said parties, be detained or seized, neither shall the searchers or other officers of those places visit such prizes, (except for the purpose of preventing the carrying of any part of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation or commerce) nor shall such officers take cognizance of the validity of such prizes; but they shall be at liberty to hoist sail, and depart as speedily as may be, and carry their said prizes to the place mentioned in

their commissions or patents, which the commanders of the said ships of war or privateers shall be obliged to show. No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of the said parties; but if forced by stress of weather, or the dangers of the sea, to enter therein, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this Treaty contained shall, however, be construed or operate contrary to former and existing public treaties with other sovereigns or states. But the two parties agree, that while they continue in amity, neither of them will in future make any treaty that shall be inconsistent with this or the preceding article.

## Treaty with France, 1778.

104. p. p. - 22, 23 / FRENCH TEXT.

## Article XVII.

It shall be lawful for the ships of war of either party, and privateers, freely to carry whithersoever they please, the ships and goods taken from their enemies, without being obliged to pay any duty to the officers of the admiralty or any other judges; nor shall such prizes be arrested or seized when they come to and enter the ports of either party; nor shall the searchers or other officers of those places search the same, or make examination concerning the lawfulness of such prizes; but they may hoist sail at any time, and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to show; on the contrary, no shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people or property of either of the parties; but if such shall come in, being forced by stress of weather, or the danger of the sea, all proper means shall be vigorously used,

## Article XVII.

Les vaisseaux de guerre de sa Majesté Très Chrétienne et ceux des Etats-Unis, de même que ceux que leurs sujets auront armés en guerre, pourront, en toute liberté, conduire où bon leur semblera les prises qu'ils auront faites sur leurs ennemis, sans être obligés à aucuns droits, soit des sieurs amiraux ou de l'armirauté ou d'aucuns autres, sans qu'aussi lesdits vaisseaux ou les d<sup>e</sup> prises, entrant dans les hâvres ou ports de sa Majesté très Chrétienne ou des Etats-Unis, puissent être arrêtés ou saisis, ni que les Officiers des lieux puissent prendre connaissance de la validité des d<sup>e</sup> prises, lesquelles pourront sortir et être conduites franchement et en toute liberté aux lieux portés par les commissions dont les capitaines desdits vaisseaux seront obligés de faire aparoir. Et, au contraire, ne sera donné asile ni retraite dans leurs ports ou hâvres à ceux qui auront fait des prises, sur les sujets de sa Majesté ou desdits Etats-Unis; et s'ils sont forcés d'y entrer par tem-

that they go out and re- pête ou péril de mer, on  
tire from thence as soon les fera sortir le plutôt  
as possible. possible.

**Treaty with France, 1800.**

(*Ad. P. P. 190, 191.*) FRENCH TEXT.

**Article XXIV.**

**Article XXIV.**

When the ships of war of the two contracting parties, or those belonging to their citizens which are armed in war, shall be admitted to enter with their prizes the ports of either of the two parties, the said public or private ships, as well as their prizes, shall not be obliged to pay any duty either to the officers of the place, the judges or any others; nor shall such prizes when they come to and enter the ports of either party, be arrested or seized, nor shall the officers of the place make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to shew. It is always understood that the stipulations of this article shall not extend beyond the privileges of the most favored nation.

Lorsque les vaisseaux de guerre des deux parties contractantes, ou ceux que leurs citoyens auraient armés en guerre seront admis à relâcher, avec leurs prises, dans les ports de l'une des deux parties, lesdits vaisseaux publics ou particuliers, de même que leurs prises, ne seront obligés à payer aucun droit, soit aux officiers du lieu, soit aux juges ou à tous autres; lesdites prises entrant dans les havres ou ports de l'une des deux parties, ne pourront être arrêtées ou saisies, et les officiers des lieux ne pourront prendre connaissance de la validité desdites prises, lesquelles pourront sortir et être conduites en toute franchise et liberté aux lieux portés par les commissions dont les capitaines desdits vaisseaux seront obligés de faire apparoir. Il est toujours entendu que les stipulations de cet article ne s'étendront pas au delà des privilèges des nations les plus favorisés.

## APPENDIX B.

**Extracts from Transcript of Record in U. S. Supreme Court in Glass vs. The Sloop Betsy.**

**THE UNITED STATES OF AMERICA,**

District of Maryland, to wit—

At a Circuit Court of the United States held at the Court house in Easton in and for the said District on Thursday, the seventh day of November, in the year of Our Lord one thousand seven hundred and ninety-three—

Present: The Honorable William Paterson, Esquire, Judge, Nathaniel Ramsey, Esqr., Marshall, Philip Moore, Clk.

Among other were the following Proceedings, Vizt.

ALEXANDER S. GLASS, THOMAS  
MASON, JOHN HERDMAN, JOHN  
HOUSEMAN, WILLIAM MASHITER,  
GILES MARDENBROW, LUCAS  
GIBBES and HENRY GIBBES,

VS.

THE SLOOP BETSY and CARGO  
and CAPT. JOHANNENE.

BE IT REMEMBERED, that heretofore, to wit on the said seventh day of November, Robert Smith, Proctor for the Appellants, files to the Court here the following Libel of Appeal—to wit—

To the Honorable the Judges of the Circuit Court of the District of Maryland.



The Libel and Appeal of Alexander S. Glass, a Citizen of the State of New York in the United States of America, and of Thomas Mason, John Herdman, John Houseman, William Mashiter, Giles Mardenbrow, Lucas Gibbes and Henry Gibbes of the Island of St. Bartholomew and Subjects of the King of Sweden, Sheweth, That your Libellants and Appellants on the sixteenth day of July in the year seventeen hundred and ninety-three, did exhibit their libel in Admiralty Court of the said District of Maryland before the Honorable William Paca, Esquire, Judge of the said District against a certain Pierre Arcade Johannene, Captain of an Armed Schooner called *The Citizen Genet*, setting forth that the Sloop *Betsy* and her cargo, being neutral Property as therein Specified were forcibly seized as Prize by the defendant the said Johannene on a voyage from the Islands of St. Bartholomew to the Port of Baltimore, and there now detained by the Defendant contrary to the Law of Nations, to the Laws of the United States and to the Treaties now subsisting between the Republic of France and the King of Sweden, and therefore praying restitution of the said Sloop *Betsy* and her cargo and also Damages as in the Libel in the Record herewith produced will more fully appear—That the said Pierre Arcade Johannene by counsel did appear and in Bar of the jurisdiction of the Court did plead the several matters and things contained at large in the Plea set forth in the said record to which plea your Libellants and Appellants did reply as will appear by a reference to the said record—And the same cause being at issue, it came to be heard before the said Honorable Judge of the said District when your Libellants and Appellants were ready and offered to prove all the several matters and things set forth in the said libel and all of which they were and still are ready to prove, but were precluded from offering any proof thereof by the opinion of the said District Court of the District of Maryland and altho no evidence was offered by the Defendant to prove the said Vessel

and cargo to be the property of any British subject, or of any other subject or citizen of a power now at war with the Republic of France or that the said vessel and cargo were liable to Capture, His Honor was pleased to order and adjudge that the said Plea to the jurisdiction of the Court be allowed and held good for the first cause stated in the Plea and that the Libel aforesaid be dismissed—That your Libellants and Appellants are advised the said Decree is erroneous and humbly appeal therefrom to this Honorable Court. There Libellants and Appellants therefore pray that this Honorable Court may hear the said cause and will be pleased to reverse the said Decree, or grant to these Libellants such relief in the Premises as to this Honorable Court shall seem meet—and your Libellants shall every pray, &c.

ROBERT SMITH,  
Proctor for the Libellants  
and Appellants.

And produces to the Court here also the Record and Proceedings of the District aforesaid mentioned in the Libel of Appeal aforesaid which follows in these words.

To wit—

THE UNITED STATES OF AMERICA,

District of Maryland, Sst.

At a Special District Court held at the Court House in Baltimore Towne in and for the said District on the fifth day of August, seventeen hundred and ninety-three.

Present.

The Honorable William Paca, Esquire, Judge,  
Nathaniel Ramsey, Esquire, Marshall,  
Philip Moore, Clk.

Among other were the following Proceedings, Vizt.

ALEXANDER S. GLASS, THOMAS  
MASON, JOHN HERDMAN, JOHN  
HOUSEMAN, WILLIAM MASHITER,  
GILES MARDENBROW, LUCAS  
GIBBES and HENRY GIBBES,

VS.

THE SLOOP "BETSY" and CARGO  
and CAPTN. JOHANNENE.

To William Paca, Esquire, Judge of the District Court of the United States for the District of Maryland:

The Libel of Alexander S. Glass, a citizen of the State of New York in the United States of America, and of Thomas Mason, John Herdman, John Houseman, William Mashiter, Giles Mardenbrow, Lucas Gibbes and Henry Gibbes of the Island of St. Bartholomew and Subjects of the King of Sweden, Humbly Sheweth—

That your Libellant Alexander S. Glass is and at the time of the Capture herein after mentioned was a Citizen of the said State of New York, and that Thomas

Mason, John Herdman, John Houseman and William Mashiter, Subjects aforesaid of the King of Sweden, are the true owners of the Sloop *Betsy* whereof William Johnston, a subject also of the King of Sweden, is Master and which said Sloop is now lying in the Port of Baltimore and within the jurisdiction of this Court—and Libellants the said Alexander S. Glass, Giles Mardenbrow, Lucas Gibbes, Henry Gibbes, Thomas Mason, John Herdman, John Houseman and William Mashiter are the true owners of the Cargo on board the said Sloop the Particulars whereof are expressed and specified in the Exhibit herewith filed marked No. 1—which said cargo was in due form of law consigned to the said Lucas Gibbes and Alexander S. Glass as by the Bills of Lading will appear—That the said Sloop with her cargo being on her voyage from the Islands of St. Bartholomew to the Port of Baltimore for which Port she was cleared out and destined and being within Five miles of the sea coast of the United States received an American Pilot on board for the purpose of conducting her safely up the Chesapeake Bay to the said Place of her destination, that after receiving the said Pilot on board she continued on the same voyage until she had arrived within two miles of Cape Henry, the Southern Promontory of the Chesapeake Bay where she, with her cargo was, on the twenty-first day of June in the year of our Lord one thousand seven hundred and ninety-three forcibly seized and taken possession of by a number of armed men under the control and command of Pierre Arcade Johanne, a Citizen of the Republic of France, and Captain of an armed schooner called the *Citizen Genet*, as a prize, and the same Sloop with her Cargo so seized, was taken to the said Port of Baltimore by the said Pierre Arcade Johanne and by him hath since been there detained and yet is in his possession and the said Pierre Arcade Johanne threatens to sell the said Sloop and Cargo—

Your Libellants not admitting that the said Pierre

Arcade Johanne was duly commissioned and authorized by the Republic of France to make Prizes of vessels belonging even to the enemies of the Republic of France humbly insist that the said seizure and Capture of the said Swedish Sloop and her cargo by the said Pierre was contrary to the laws of the United States of America, to the law of Nations and to the express Provisions of the Treaties at this time subsisting between the Republic of France and the King of Sweden— In as much then as the capture and detention of the said Sloop *Betsy* and her cargo are manifestly unjust and contrary to the laws of the United States, to the laws of Nations and to the Treaties now subsisting between the Republic of France and the King of Sweden— Your Libellants pray that the said *Betsy*, her cargo, Tackle, apparel and furniture and all other things to her belonging, may, by the Decree of this Court, be restored to your Libellants and that full satisfaction may be made by the said Pierre Arcade Johanne and all others concerned for the unlawful Capture and detention of the said Sloop and cargo and all damages and expenses incurred thereby. For which end your Libellants humbly pray process of attachment and monition as in like cases is customary.

ROBT. SMITH,  
Proctr. for Libellants.

. . .



ALEXANDER S. GLASS and OTHERS

VS.

THE SLOOP "BETSY" and CARGO  
and PETER ARCADE JOHANNE.

In the Admiralty Court of the United States for the District of Maryland.

And the said Peter Arcade Johanne saith this Court jurisdiction of the Libel aforesaid and the matter therein set forth ought not to have, because by Protestation not confessing or acknowledging any of the matters and things in and by the said Libel set forth to be true for plea to the said Libel the said Peter Arcade Johanne saith that on or about the first day of February in the year of our Lord One thousand seven hundred and ninety-three the National Convention of France decreed in the name of the French Nation that the French Republic is at war with the King of England, and the said Peter Arcade Johanne further saith that after the first day of February in the year of our Lord seventeen hundred and ninety-three actual war took place and open hostilities were carried on between the Republic of France and the King of Great Britain and that the said Nations of France and of Great Britain ever since were and now are in a state of actual war and open hostilities and the said Peter Arcade Johanne further saith that after to wit on the ——— April in the year seventeen hundred and ninety-three he, the said Peter Arcade Johanne, being a citizen of the Republic of France was duly commissioned by the said Republic as Captain of a certain armed Schooner called *Citizen Genet*, which said armed schooner was fitted out by, and belongs to citizens of the said Republic of France and the said Peter Arcade

Johanne further saith, that by his said Commission he was authorized to command the said Schooner and therewith and by force of arms to apprehend, seize and take all ships and vessels, good wares, merchandise, and effects belonging to the enemies of the said Republic—and the said Johanne further saith that in virtue of the said Commission, he the said Peter Arcade Johanne with his officers, seamen and mariners on board the said armed Schooner called the *Citizen Genet* on the fourth day of July in the year of our Lord Seventeen hundred and ninety-three on the Atlantic Ocean and about fifteen miles from any part of the sea coast of the United States and about that distance from any of the Islands of the said United States seized and took as Prize the said Sloop called the *Betsy*, with the cargo then on board, the said Sloop and cargo being at the time of the said Capture the property of some Subject or Subjects of the King of Great Britain, the said King of Great Britain and his subjects at the time of the Capture and long before being at actual war and open hostilities with the French Republic, as to the said Johanne it was lawful by the law usage and practice of nations and the laws of the said Republic and also by virtue of his said Commission from the said Republic—and the said Peter Arcade Johanne further saith that by a Treaty of Amity and Commerce, made between the United States and the late King of France concluded and signed at Paris on the sixth day of February in the year of our Lord One Thousand seven hundred and seventy-eight by Plenipotentiaries of the said King and the said United States duly and respectively authorized for that purpose, it was among other things agreed and established as follows, that is to say, "That it shall be lawful for the ships at war of either party and privateers freely to carry whither so ever they please *they* ship and goods taken from their enemies, without being obliged to pay any duty to the officers of the Admiralty or any other Judges, nor shall such prizes be arrested and seized

when then they come to and enter the ports of either party, nor shall the searchers or other officers of those places search the same or make examination concerning the lawfulness of such prizes, but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions which the commanders of such ships of war shall be obliged to shew." And the said Peter Arcade Johanne further saith that Peace and Friendship hath subsisted since the year seventeen hundred and seventy-eight and still subsists between the Government of the United States and the Government of France and between the citizens of France and the citizens of the United States and in consequence of the said peace and friendship and the stipulation aforesaid in the said treaty, the said Johanne brought the said Sloop and cargo as Prize into the Port of Baltimore and the said Peter Arcade Johanne further saith that the said Prize ought not to be arrested or seized or the lawfulness of the said prize inquired into by the United States or any of its Courts of Justice or Officers of the said United States—and the said Peter Arcade Johanne further saith, that by the law of Nations when two nations are at war they have a Right to make Prizes of the ships and vessels, goods, wares and merchandise and effects of each other found and taken on the high seas and that whatsoever is the Property of an enemy may be acquired by capture at sea—

. . .

For all which causes the said Johanne doth humbly demand the judgment of this Honorable Court whether he shall be compelled to make answer unto the said Libel and whether this Court will cognisance or jurisdiction of the Libel aforesaid and the matter therein contained respecting the said Sloop and her cargo so taken and condemned as aforesaid as lawful prize— And the said Johanne also humbly prays that the said Sloop and cargo maybe discharged from arrest and be delivered up to him and that he maybe hence dismissed with costs and

damages by him in this behalf most wrongfully sustained.

JAMES WINCHESTER,  
Proctor for the Captors.

• • •

And now here also cometh the Libellants by Robert Smith their Proctor and file here the following Replication, to wit—

These Repliants protesting that this Court hath jurisdiction of the Libel aforesaid and of the matter therein set forth and having to themselves all and all manner of advantages of exception to the manifold Insufficiencies of the said Plea—for Replication thereunto say, that the said Plea of the Defendant and the facts and allegations therein contained are untrue, all of which matters and things there Repliants pray may be enquired of as this Honorable Court shall award and humbly pray, etc.

ROBT. SMITH,  
for the Libellants.

And because the Judge now here is not yet advised of his Judgment to be rendered of and concerning the premises Day therefore is given to the parties aforesaid here until the fifteenth day of August Instant to hear his Judgment of and concerning the Premises because the said Judge now here is not yet advised—

And now here at the Day, to wit the said fifteenth day of August, seventeen hundred and ninety-three cometh the Parties aforesaid— Whereupon all and singular the matters and things being considered and understood upon the proof made in the said cause, did order and adjudge that the Plea aforesaid to the jurisdiction of this Court be allowed and held good for the first cause stated in the Plea and that the Libel aforesaid be dismissed with Costs to the said Defendant, and it is further ordered by the Court that the said Sloop and Cargo be discharged from arrest and restored to the said Defendants— Whereupon the said Libellants now here pray an Appeal—

• • •

GLASS AND OTHERS

vs.

The Sloop "BETSY" & CARGO  
and CAPTN. JOHANNENE.

Appeal to the Circuit Court of the United States for the Maryland District. Novr. Term, 1793.

It is admitted by the Appellants and agreed that this admission shall be received as evidence, on the hearing of the said appeal, that war exists between Great Britain and France as stated in the plea; That the said Johannene is a citizen of France, and was commissioned as a Captain of the said armed Schooner called the *Citizen Genet* and that the Capture of the Sloop and Cargo aforesaid was made on the day, at the place and in the manner stated in the Plea of the Captors and brought as Prize into the Port of Baltimore— But the said Appellants do not admit that the said Sloop and cargo was the property of British Subjects.

ROBT. SMITH,  
Proctor for Appellants.

And now here before the Judge aforesaid on the Day and year aforesaid all and singular the matters and things being seen, It is ordered adjudged and Decreed by the Court that the said Appeal be dismissed with costs, and that the Decree made in the said case by his Honor the District Judge of the District of Maryland be affirmed.

[This decree was thereafter reversed by the United States Supreme Court, 3 Dall., 6.]



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1916.

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No. 650.

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HANS BERG, PRIZE MASTER IN CHARGE OF THE  
PRIZE SHIP APPAM, AND L. M. VON SCHIL-  
LING, VICE CONSUL OF THE GERMAN EM-  
PIRE, *Appellants*,

*vs.*

THE BRITISH AND AFRICAN STEAM NAVIGA-  
TION COMPANY, LIMITED, *Appellee*.

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**SUPPLEMENTAL MEMORANDUM OF AUTHORI-  
TIES SUBMITTED BY APPELLEE.**

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In connection with the oral argument, the following ad-  
ditional authorities and observations are submitted on be-  
half of the appellee in printed form for the convenience  
of the court.

Under general international law it seems clear that prizes can not be laid up in neutral ports for an indefinite time or until the close of the war. It seems clear also that the Treaty of 1799 between Prussia and the United States does not modify this rule. Even if it be assumed that, when an officer detached from the captor ship brings a prize into a neutral port, the captor ship itself may be said to "carry" (*conduire*) the prize through the agency of such officer—a construction which the appellee does not accept—it is still clear that the Prussian Treaty of 1799 grants to prizes no right of indefinite stay in the neutral port. Even if the entry be not itself illegitimate because of the illegitimate purpose for which it is made—and this is the contention of the appellee—it is still clear that an indefinite stay of the vessel is illegitimate.

It is contended by the appellants that, even if the laying up of the "Appam" in a neutral port is illegitimate, it is still not in the power of the court to restore her to her original owners. This contention is based on the theory that title to the captured ship vested in the German Government at the moment of capture; that at the same moment the title of the British owners was divested; and that a *subsequent* violation of American neutrality can not revive a title which has been definitely extinguished.

If this contention be upheld, the United States is left, in the case at bar, without power to protect itself by attaching any penalty to the violation of its neutrality. The laws of the United States do not expressly authorize proceedings to forfeit the vessel or to impose any direct penalty on the persons who are responsible for the offense. In the case at bar, it can not even compel the German officer who brought the vessel into our waters to take it out again, because he has not at his command the necessary complement of officers, engineers and sailors, and he can not

obtain them without violation of our neutrality laws. Accordingly, if the contention of the appellants be accepted, the offense against our neutrality must persist at least until the close of the war; and the illegal purpose for which the "Appam" was brought into Newport News is as effectually attained as if her stay in American waters were recognized as legitimate.

The fallacy of the appellants' reasoning lies in the use made of the word "title." They wholly ignore the fact that there are many kinds and degrees of title, ranging from naked possession—which both in the civil and in the common law is a title—to full ownership.

Failure to analyze precisely the nature and extent of title acquired by capture has frequently tended to confuse legal reasoning concerning the law of prizes.

It is submitted that the capture of an enemy vessel by a warship vests in the captor state a title indeed, but not full title. It vests a title that is capable of being bettered by degrees until it becomes perfect. The doctrine that it becomes complete, or is even bettered, by an undisturbed possession of twenty-four hours is not today recognized; but at modern international law title by capture is essentially strengthened when the captured vessel is brought into the territorial waters of the captor state, and it becomes full and incontestable when the prize is condemned by a competent court. In the meantime, the inchoate right established by capture is capable of being defeated. In other words, the title established by capture may fail to become a good title. If the "Appam" had been recaptured by a British or a French cruiser, it is not necessary to say that the title vested in the German Government by capture would have been divested by recapture; it is equally true, and it is perhaps more exact to say, that the inchoate right established by the fact of capture would have been destroyed



by the loss of the basis upon which it rested, namely, possession.

It is recognized that capture gives no title, creates nothing that can be called even an inchoate right, unless the capture be made in accordance with the rules of international law. It is submitted that, even when such an inchoate right has been established, it can not be perfected, unless, up to the moment of judicial condemnation, possession is *maintained* by the captor in accordance with the rules of international law. The situation is analogous to that in which at Roman law, the inchoate right to property established by obtaining possession under color of title is ripening by lapse of time into the full right of ownership. In such cases it is recognized that, during the entire period of incomplete prescription, not only must possession be maintained, but it must be at all times such a possession as the law requires. If, for example, the possessor of an easement, instead of continuing to use it openly, begins to use it stealthily (*clam*), his possession becomes faulty (*vitiosa*) and can not ripen into full title. (Dig., 8, 5, 10 pr.) In modern civil law, the same principle is applied as regards the necessity of continuous good faith for acquisition of full title by prescription: *mala fides superveniens nocet*.

In the case at bar, it is submitted that the German possession of the "Appam" is *vitiosa* and *mala fide*, because contrary to international law, so long as the vessel is laid up in an American harbor. Even if the captor's possession was legitimately established at the outset—a contention which the appellee disputes—and even if it continued to be legitimate, so long as the captured vessel was on the high seas, it nevertheless became a possession which international law does not approve and can not recognize when the prize was laid up in a neutral harbor. The process by which the inchoate right vested in the German Government

that have ripened into full right was interrupted as effectively as if the "Appam" had been recaptured; because a possession that is maintained only by transgressing the law of international law is, from the legal point of view, no possession.

It is submitted, on the other hand, that when a vessel is captured by an enemy warship the original owners are not completely divested of the right of ownership until the entire adverse right has become complete. In the meantime, although the captor has a title, they still have the

Here again the situation is analogous to that which exists at civil law when an adverse possession has been established with color of title. Until the period of prescription is completed the title of the original owner is not lost.

When a vessel captured by an enemy warship is recaptured, we say that the title of the original owners reverts and is re-established. It might be more exact to say that their title, menaced with extinction by the establishment and perfection of an adverse right, has been freed from this menace; that the full exercise of their right has again become possible. This construction is more satisfactory; because it is clear that, if the enemy state had acquired full title by capture, recapture would logically vest title not in the original owners, but in their government.

That this is in reality the principle underlying the law of restoration in case of recapture is shown by the fact that, wherever it is recognized that the title acquired by capture has ripened into ownership, recapture does not revive or re-establish the right of the original owners. The recaptured vessel is, on the contrary, good prize and becomes the property of the recaptor state.

The *Consulatus Maris* declares that, if the prize had already been carried into a place of safety, *infra praesidia*,

and if it were then taken away from the enemy, it belongs to the recaptor. \* \* \* In the contrary case, the prize reverts to the owner who had lost possession \* \* \* on the condition of paying to the recaptor a recompense determined by agreement or by arbitration." Bonfils, *Droit International Public* (Paris, 1914), par. 1416. The learned author goes on to show that, when the theory of pernoctation was adopted, recapture after twenty-four hours of possession by the captor similarly vested ownership in the recaptor; and that when and insofar as it has been held that the title of the captor was perfected only by condemnation, recapture after condemnation does not revive the right of the original owners.

Similarly, Justice Story: "It is admitted, on all sides, by public jurists, that in case of capture a *firm possession* changes the title of the property; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture, or on the pernoctation, or on the carrying *infra praesidia*, of the prize; it is universally allowed that, at all events, a sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign." *The Star*, 3 Wheaton, 78, 86.

Since 1800, the principle that recapture before condemnation gives the original owners a claim for restoration on payment of salvage, but that recapture after the enemy captor's title has been perfected by such condemnation excludes any such claim, has been embodied in the statutory law of the United States. (Revised Statutes, Sec. 4652.)

It is submitted that opinions and judicial or legislative decisions upon the effects of recapture are of the highest weight in considering the nature and extent of the title acquired by capture, because the determination of this

latter question is essential to the determination of the opposing claims of the recaptors and of the original owners.

It is not claimed that the determination by Congress of the moment at which complete title is vested by capture is in any way binding upon the Federal judiciary in cases to which the statute does not apply and which are governed by the general principles of international law. In a matter, however, in which the theories of writers, the legislation of civilized states, and the decisions of the courts have not been in harmony, a legislative decision, maintained for more than a century, should have no little weight in determining the attitude of a co-ordinate branch of the Government; particularly when the rule accepted by the legislature has, in the words of Justice Story, been "universally allowed" to be a proper one. It is asserted to be *the* proper one by the most recent authoritative writer on international law, M. Bonfils (loc. cit., p. 986), who cites as supporting the same view Bluntschli, Gessner, Hautefeuille and de Boeck.

It will be noted that, whatever difference of opinion or of legislative decision still exists as to the moment at which a captor's title becomes good title, there is a general agreement that the fact of capture does not vest such a title until, as Justice Story expressed it, possession has become "firm," or, as it is expressed by others, until the chance of recapture has become slight. It is submitted that in the case of the "Appam," the original capture gave no such "firm" possession, and that the chances of recapture were overwhelming. The action taken by the captor indicates that he saw no way of excluding recapture except by bringing his prize under the shelter of a neutral sovereignty.

The position here taken, that the right of the original owners is not extinguished by the fact of capture, has been applied in those cases in which our courts have decided that the capture was illegal *ab initio*. There is no reason why

the same theory should not be applied in all cases in which the possession of the captor government has become illegal by the manner in which it is maintained. At least, there is no reason to be drawn from the logic of the law or from considerations of right and justice. The only argument against this new application of the principle involved is found in national policy. The point of view taken by the appellants is the undesirability of wresting from a foreign and friendly sovereign, even in defense of our own neutrality, a vessel captured by officers acting under his commission; and appellants lay much stress on *dicta*, justly deriving weight from the personality of the Judge who uttered them, indicating an inclination on his part to limit the application of the principle involved to the narrow class of cases in which it had already been applied. It is respectfully submitted that a policy that seemed important more than a century ago, when the United States, by reason of its relative weakness, was bound to exercise the greatest care in avoiding international complications, but which even then was not allowed to control the decisions of this court, need not today stand in the way of a new application of the principle involved in those earlier cases, if such application seems due to our national dignity.

It is accordingly submitted that, when the "Appam" was laid up, contrary to the law of nations, in our neutral port, the possession of the ship by its captors became illegal; and the inchoate right which had been vested in the German Government by capture was divested. The right of the British owners of the vessel, which had not yet been divested and could not be completely divested until the captors' title was confirmed, became again capable of full exercise. Accordingly the District Court was not in error in entertaining their libel and in recognizing their claims.



Appellants' contention, that the "Appam" became, by virtue of legal capture, a German public vessel, falls with their contention that Germany acquired full title, *i. e.*, ownership, at the moment of capture. If, as is here maintained, Germany acquired merely a title, that is to say, an inchoate right, by the fact of capture, it is obvious that the "Appam" did not thereby become a German public vessel.

The authorities relied on and referred to in the foregoing discussion will now be cited more at length. They fully establish the rule that until condemnation the original owner's rights are never finally extinguished but merely remain in abeyance. Leading French, German and English commentaries are in agreement as regards this. Bluntschli thus lays down the rule in his work, *International Law Codified*, paragraph 860:

"Before condemnation a prize may be recaptured from the captor. The recaptor must, nevertheless, in this case respect the private property."

In the notes to this section he says:

"1. Up to the time when the tribunal has taken jurisdiction and condemned the prize the fate of the latter is uncertain; neither the captor nor his Government have as yet rights over the vessel or its cargo, the prize resting up to the date of the judgment merely upon the right of the stronger; the seizure may be annulled by force. This is a special application of the right of *post liminium*, and in *integrum restitutio*.

"2. The recapture has effects essentially negative; it annuls the capture (prize). It does not even constitute a new capture (prize). The recaptor must then respect the goods which he has saved from the hands of the enemy and for his services can only claim a

recompense (rescousse) (servaticium) which is determined sometimes at an eighth (American law from 1800, Chapter 14, and English Law, Chapter 17, Victoria), sometimes at a third of the value of the recapture (The Consolato del Mare, Chapter 287, had already admitted this rule).

"3. The recaptor must not only respect neutral property but even that of citizens of the belligerent state of which the vessels made the recapture.

"4. Certain jurisconsults and legislations still further restrict the idea of recaptures. They do not admit it, for example, unless the recapture takes place within twenty-four hours or if the vessel is retaken before having been conducted to a place of safety. Where there are laws governing the case these must naturally be complied with, but the rule stated in our text seems to us more in conformity with the nature of things."

#### 860 bis

"If the recaptured ship succeeds in escaping before condemnation and is not retaken the capture (prise) is without effects and all danger of the loss of property rights is eliminated."

In connection with this section Bluntschli refers back to the following:

#### "739

"Immovable property of which the owners have been dispossessed by an enemy during war returns to its owners in virtue of the right of *post liminii*, if the enemy is in turn driven away.

#### "740

"Movables taken away by the enemy may be retaken by the injured proprietor up to the end of the war, etc.

*"The recapture of captured vessels may take place so long as prize courts have not pronounced upon the validity of the capture."*

The same rule is stated in one of the leading French authorities, Bonfils, *Manuel de Droit International Public*, Paris, 1914, as follows:

"No. 1416.—Recaptions.—A merchant ship is captured by a hostile war vessel, then recaptured by a war ship of its own nation. What are the effects of this rescue? Do the ship and its cargo revert to their owners, or do they become the property of the recapturing government? From the point of view of jurisprudence this question, it would seem, ought to raise no difficulty. Until the judgment passed upon the validity of the capture shall recognize its legitimacy and shall order the confiscation of the ship and of the cargo, the captor has acquired no right of ownership. The right of the owner who has been dispossessed has been *paralyzed* but not extinguished. The recaptor can have no more right than those from whom he has recaptured the prize. The owner ought then to re-enter into possession of the property taken from him by violence. Such a decision is logical and in accordance with the spirit of justice.

"The solution of this question could be different only if it were assumed that the very fact of capture *per se* transferred to the captor the ownership of the captured ship and cargo. Under this assumption whatever right the original captor had acquired by the capture would pass to the recaptor."

Bonfils then outlines the history of the rules in regard to *pernoctation* and bringing *infra praesidia*, and finally gives the modern doctrine of condemnation. He concludes as follows:

"No. 1420.—Among writers, Grotius, Puffendorf, Bynkershoek and Vattel adopt the system of the "Consulate of the Sea," such also appeared to be the opinion of Geffcken, in his edition of Heffter, Sec. 138, note 1. \* \* \* Bluntschli, Gessner, Hautefeuille and de Boeck recognize the possibility of rescue only before condemnation of the ship by a competent court and authorize the restoration of the prize to its original owner only in this case. If, however, the prize has been condemned and awarded to the captor, this decision modifies the legal situation, creates definitive rights enuring to the captor, and divests the owner whose ship was captured of his right of ownership; and the second capture is not a rescue but a new prize.

"This is the better opinion. Prize, *per se*, has only purely negative results. It is an impediment to the exercise of the rights of the owners of the ship and its cargo; it is not a legal ground of acquisition. Every prize must be passed upon by a proper court. Until condemnation, the captor is not owner. Until sentence of condemnation, prize and rescue are simply successive facts, the first unfavorable, the second favorable to the owner."

In the latest edition of Wheaton's International Law (Phillipson's, 1916), it said, at p. 581:

"Property of the enemy taken on land is usually called *booty*, while that captured on the high seas, with the exception of armed vessels, has acquired the name of *prize*. There is a very important distinction between them as regards the mode in which the captor acquires a title to the captured property. Booty belongs to the captor as soon as he has acquired a firm possession of it. No adjudication of any court is necessary to establish his title. On the other hand, a title to prize is acquired as a general rule only after the property has been condemned by a competent court. By the modern usage of nations neither the twenty-four hours

possession, nor the bringing the prize *infra praesidia*, is sufficient to change the property in the case of a maritime capture. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance, or in a state of legal sequestration. If condemnation follows capture, the effects of condemnation relate back to the date of capture. Abandonment of the prize or loss of possession puts an end to the effects resulting from the original capture; so that anyone who subsequently acquires possession is regarded as the sole captor. The enemy's armed vessels are not subject to the adjudication of a Prize Court. Ships and their cargoes are not invariably prize. Thus during the American Civil War a ship captured in a river by a detached naval force in boats was held not to be a maritime prize or to be condemned as such."

In Oppenheim's International Law, Vol. 2, Sec. 196, the author states the rule in similar fashion:

"The prize is lost (1) when the captor intentionally abandons her, (2) when she escapes by being rescued by her own crew, or (3) when she is recaptured. As through capture the prize becomes according to international law the property of the belligerent whose forces made the capture, provided a prize court confirms the capture, so such property is lost when the prize vessel becomes abandoned or escapes or is recaptured. *And it seems to be obvious and in every way recognized by international law that as soon as a captured enemy merchantman succeeds in escaping the proprietorship of the former owner revives ipso facto.*"

At no time and under no assumption was mere capture sufficient to extinguish the rights of the original owner. An excellent statement of the evolution of the rule is found in Upton's Maritime Warfare and Prize (1861). This



was the standard work during our Civil War. Upton, treating of *post liminium*, says:

"While some writers have stated it to be sufficient if the property had been twenty-four hours in the enemy's possession, others have declared it to be requisite that it should be carried *infra praesidia*, that is within the camps, ports or fleets of the enemy, and still others have arbitrary rules. It has become in later days a well established principle that possession of a more absolute and decided character is requisite to confer such a title as could extinguish the right of *post liminium*. 'I apprehend,' says Lord Stowell, in a case involving the question 'that by the general practice of the law of nations a sentence of condemnation is at present deemed generally necessary and that a neutral purchaser in Europe during war does look to the legal sentence of condemnation as one of the title deeds of the ship if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent has thought himself quite secure in making that purchase merely because that ship had been in the enemy's possession twenty-four hours or carried *infra praesidia*' (The Fladoyen, 1 Rob., 134). So the rule which requires a sentence of condemnation is undoubtedly the established rule in England. *It is there held that until such condemnation the property is not changed in favor of the vendee or recaptor so as to bar the original owner. As long ago as in the reign of Charles II a solemn judgment was rendered on this point and restitution of a vessel was decreed after she had been fourteen weeks in the enemy's possession because she had not been condemned.* This early judgment of a court of admiralty is cited with approval by Lord Mansfield in a case before him in which the point arose (Goss v. Withers, 2 Burr., 583). The English courts of common law have since enforced the rule even to the extent of holding after four years of possession and the performance of several voyages, that the title does not change without the sen-

tence of condemnation. A sentence of condemnation has been held to be, first: a sentence by a competent court of jurisdiction, and second a sentence of such court either in the country of the enemy or an ally and not in a neutral country."

The rule is found embodied in the Prize Act, United States Revised Statutes, Sec. 4652, which has been in force since 1800. Sec. 4652 prescribes:

"When any vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture, by any competent authority, the court shall award a meet and competent sum as salvage, according to the circumstances of each case. If the captured property belonged to the United States, it shall be restored to the United States, and there shall be paid from the Treasury of the United States the salvage, costs, and expenses ordered by the court. If the recaptured property belonged to persons residing within or under the protection of the United States, the court shall adjudge the property to be restored to its owners, upon their claim, on the payment of such sum as the court may award as salvage costs and expenses. If the recaptured property belonged to any person permanently resident within the territory and under the protection of any foreign prince, government or state in amity with the United States, and by the law or usage of such prince, government or state, the property of a citizen of the United States would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner, upon his claim, upon such terms as by the law or usage of such prince, government or state would be required of a citizen of the United States under like circumstances of recapture; or when no such law or usage shall be known, it shall be adjudged to be restored

upon the payment of such salvage, costs and expenses as the court shall order. The whole amount awarded as salvage shall be decreed to the captors, and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize. Nothing in this title shall be construed to contravene any treaty of the United States."

It has been held that the principle of *jus post liminii*, so far as it relates to the capture of vessels belonging to American citizens, is embodied in this section. See *Oakes v. United States* (1895), 30 Ct. Cl., 378.

The law of Great Britain is contained in Section 40 of the Naval Prize Act (1864) and provides that a captured vessel, except when she has been used by the captors as a ship of war, shall be restored to the owner upon his paying one-eighth to one-fourth, as the Prize Court may award, of her value as prize salvage, no matter if the recapture was made before or after the enemy prize court had condemned the capture.

The general principle of the law of nations as to recapture is succinctly stated by Mr. Justice Story in the case of "*The Star*," 3 Wheaton 86. This was an American ship captured by the enemy and after condemnation and sale to an enemy merchant, recaptured. Justice Story said:

"If the case were to stand on the general salvage act of 1800, in cases of recapture, it is perfectly clear that the claimants are barred of all right; for that act expressly excepts from its operation, all cases where the property has been condemned by competent authority. The same result would flow from the principles of the law of nations. *It is admitted, on all sides, by public jurists, that in cases of capture a firm possession changes the title to the property; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture or on the pernocation, or on*

*the carrying infra praesidia of the prize; it is universally allowed, that at all events, a sentence of condemnation completely extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign. It would follow, of course, that property recaptured from an enemy after condemnation would, by the law of nations, be lawful prize of war, in whomsoever the antecedent title might have vested.*

The cases dealing with the effect of a rescue by the crew of the captured vessel emphasize the defeasible character of the captor's rights.

See *The Beaver*, 3 C. Rob., 292.

Here a British vessel was captured by a French cruiser which sent a Prize Master and prize crew aboard and removed all of the British crew, except the Master and one boy. The Master seized a favorable opportunity to attack the Prize Master and succeeded in driving him and the prize crew below and locking them in. He then started to navigate the vessel to an English port and was assisted by a detail from a British frigate which he had met. All hands then left the vessel on account of stress of weather, but afterwards returned and brought her safely in. The court, by Lord Stowell, held that it was "a case of very peculiar merit on the part of the original salvors," to wit, the Master and the boy, and gave the ship back to the owners subject to heavy salvage in favor of the original salvors and a smaller amount in favor of the frigate.

Two other cases of rescue are mentioned in one of Dana's notes to Wheaton at pages 474-475, "The Emily St. Pierre" during the Civil War, and "The Experience" in 1799. These cases were the subject of diplo-

matic discussion. In the case of "The Experience," Mr. Pickering, Secretary of State, spoke of the "inchoate and belligerent right" of the captors; and in the case of "The Emily St. Pierre," Earl Russell, for the British Government, spoke of the captor's "temporary possessory right which he has between capture and condemnation." The diplomatic correspondence in regard to "The Experience," which refers also to the earlier case, of "The Emily St. Pierre," may be found in U. S. Dipl. Corr. 1862, pp. 75-148.

The statement in the main Brief for the Appellees, that the Prussian Treaties of 1785, 1799 and 1828 were in French, was based upon Secretary Lansing's letter to the German Ambassador of March 2, 1916, in which he says, after quoting the English text of Article XIX of the Treaty of 1799:

"This translation is taken from the published treaties of the United States, and while not conforming strictly to the original French text (a copy of which is enclosed) is sufficiently accurate for the purposes of this note." (Record, p. 18.)

This appears to have been an inadvertence, as Appellant's Reply Brief (p. 8) calls attention to the fact that these treaties were executed in both French and English. However, where the English text is ambiguous and the French text is clear and specific, manifestly the French text must control, as showing the intention which was ambiguously expressed in the other language.

There are certain other early treaties which show that, where it was intended to give or secure any greater privileges than those clearly expressed in the Prussian Treaty, appropriate language was used.



The Treaty with Algiers of 1798 contains the following articles:

ARTICLE IX.

If any of the Barbary States at war with the United States of North America shall capture any American vessel and bring her into any of the ports of this Regency, they shall not be permitted to sell her, but shall depart the port on procuring the requisite supplies of provision.

ARTICLE X.

Any vessel belonging to the United States of North America when at war with any other nation, shall be permitted to send their prizes into the ports of the Regency, have leave to dispose of them without paying any duties on sale thereof. All vessels wanting provisions or refreshments shall be permitted to buy them at market price.

The Treaty with Algiers of 1816 contains the following:

ARTICLE XVIII.

If any of the Barbary Powers, or other States at war with the United States, shall capture any American vessel and send her into any port of the Regency of Algiers, they shall not be permitted to sell her, but shall be forced to depart the port on procuring the requisite supplies of provisions; but the vessels of war of the United States, with any prizes they may capture from their enemies, shall have liberty to frequent the ports of Algiers for refreshment of any kind, and to sell such prizes in the said ports, without paying any other customs or duties than such as are customary on ordinary commercial importations.

The Treaty with The Netherlands of 1782 contains the following:

## ARTICLE V.

The vessels of war and privateers, of one and of the other of the two nations, shall be reciprocally, both in Europe and in the other parts of the world, admitted in the respective ports of each with their prizes, which may be unloaded and sold according to the formalities used in the State where the prize shall have been conducted, as far as may be consistent with the 22d article of the treaty of commerce; Provided always, that the legality of prizes by the vessels of the Low Countries, shall be decided conformably to the laws and regulations established in the United Netherlands; as likewise that of prizes made by American vessels, shall be judged according to the laws and regulations determined by the United States of America.

The Treaty with Sweden of 1783 contains the following:

## ARTICLE XVIII.

If it should happen that the two contracting parties should be engaged in a war at the same time with a common enemy, the following points shall be observed on both sides:

\* \* \* \* \*

4. The men-of-war and privateers of the two nations shall reciprocally be admitted with their prizes into each other's ports; but the prizes shall not be unloaded or sold there until the legality of a prize made by Swedish ships shall have been determined according to the laws and regulations established in Sweden, as also that of the prizes made by American vessels shall have been determined according to the laws and regulations established by the United States of America.

\* \* \* \* \*

## ARTICLE XIX.

The ships of war of His Swedish Majesty and those of the United States, and also those which their sub-

jects shall have armed for war, may with all freedom conduct the prizes which they shall have made from their enemies into the ports which are open in time of war to other friendly nations; and the said prizes upon entering the said ports shall not be subject to arrest or seizure, nor shall the officers of the places take cognizance of the validity of the said prizes which may depart and be conducted freely and with all liberty to the places pointed out in their commissions, which the captains of the said vessels shall be obliged to show.

There is an interesting summary of treaties in regard to prizes in neutral ports in Phillimore's *International Law*, Vol. 3, Sec. 380.

The German Ambassador expressly admitted, in his memorandum for the State Department (Rec., p. 71), that the Prussian Treaty of 1799 "made it necessary that the prize was brought into port by the capturing vessel," and contended for a wider application in view of "the development of modern cruiser warfare."

That the whole duty of a nation as to neutrality is not confined to the cases provided for by express statutes appears from one of Dana's notes to Wheaton, in which the diplomatic correspondence in regard to the "Alabama" is digested. It is there stated that Mr. Adams, American Minister, in a letter to Earl Russell of May 20, 1865,

"states the rule as unquestionable that a want of statute provisions [against violations of neutrality] is never a justification to a nation and can not be even an excuse or apology after the want is known, or an opportunity is open for supplying it."

The custody of the District Court over the "Appam" since the libel was filed has been complete (Record, pp. 10, 95), and the claim of the appellants (Reply Brief, p.

35), that she is still in the "active possession of the German Government," shows a disregard of the power and jurisdiction of the United States Courts similar to the captor's disregard of United States neutrality.

Respectfully submitted,

FREDERIC R. COUDERT,

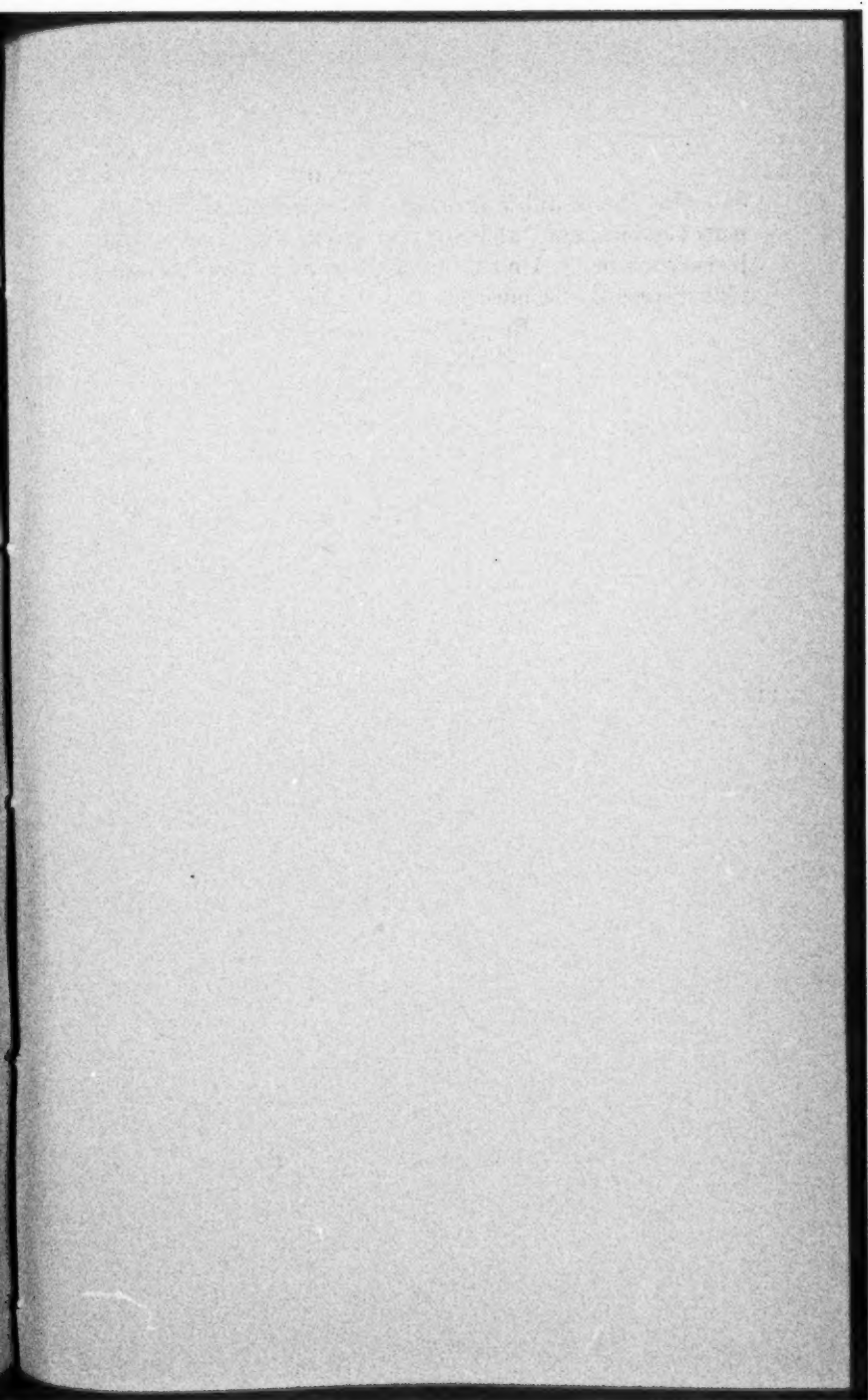
MUNROE SMITH,

HOWARD THAYER KINGSBURY,

FLOYD HUGHES,

RALPH JAMES M. BULLOWA,

*Counsel for Appellees.*







JAN 5 1917  
JAMES D. MAHER  
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1916  
No. 650

HANS BERG, PRIZE MASTER IN CHARGE OF THE  
PRIZE SHIP APPAM, AND L. M. VON SCHILLING,  
VICE CONSUL OF THE GERMAN EMPIRE,

*Appellants,*

BRITISH AND AFRICAN STEAM NAVIGATION  
COMPANY, LTD.,

No. 725

HANS BERG, PRIZE MASTER IN CHARGE OF THE  
PRIZE SHIP APPAM, AND L. M. VON SCHILLING,  
VICE CONSUL OF THE GERMAN EMPIRE,

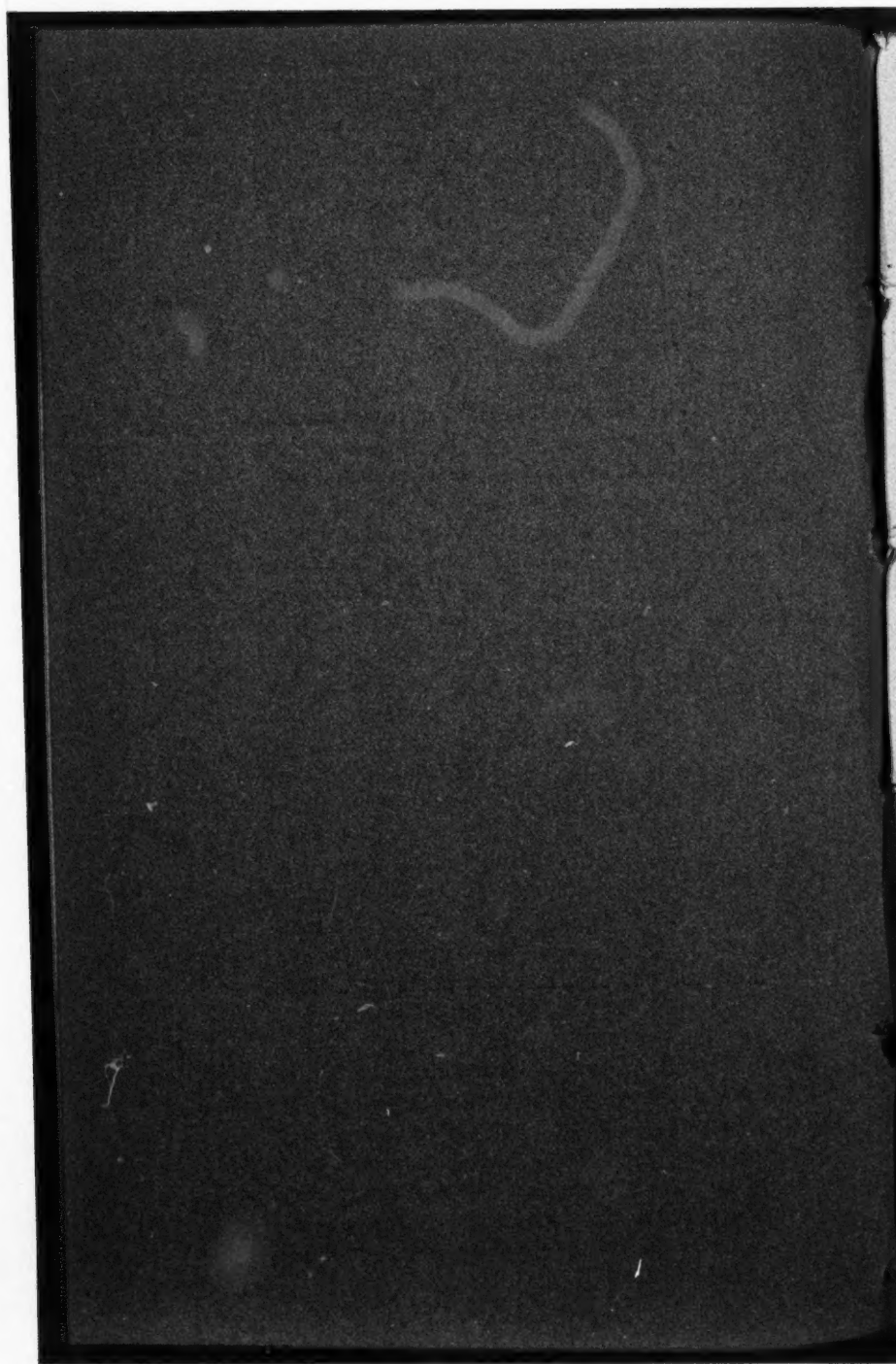
*Appellants,*

HENRY G. HARRISON, MASTER OF THE STEAMSHIP  
APPAM,

BRIEF FOR APPELLEES

VICTOR M. S. JENNERT  
HOWARD THAYER KINGSBURY  
JAMES E. SUMMERS  
HERBERT BAILEY  
FLOYD BUCKING  
RALPH JAMES M. DILLON

*Counsel for Appellees.*



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**SUPREME COURT OF THE UNITED STATES,**

**OCTOBER TERM, 1916.**

**HANS BERG, Prize Master in Charge  
of the Prize Ship "APPAM" and  
L. M. VON SCHILLING, Vice Consul  
of the German Empire,  
Appellants,**

**vs.**

**BRITISH & AFRICAN STEAM NAVIGA-  
TION COMPANY, LIMITED.**

**No. 650.**

**HANS BERG, Prize Master in Charge  
of the Prize Ship "APPAM" and  
L. M. VON SCHILLING, Vice Consul  
of the German Empire.  
Appellants,**

**vs.**

**HENRY G. HARRISON, Master of the  
Steamship "APPAM."**

**No. 722.**

**BRIEF FOR APPELLEES.**

**Statement of Facts.**

The statement of facts, pleadings and proceedings contained in the appellants' brief is in the main correct, but it makes little or no reference to No. 722 (the cargo case) and is in certain other respects incomplete or inadequate. A brief but consecutive restatement of the whole matter

is accordingly requisite for a proper presentation of the questions at issue.

These are appeals taken direct to this Court from the District Court on the ground that the construction of a treaty is involved. No. 650 is a suit in admiralty brought by the British & African Steam Navigation Company, Limited, the owner of the British steamship *Appam*, to recover possession thereof. No. 722 is also a suit in Admiralty, brought by the Master of the vessel to recover possession of the cargo. The present appellants appeared as claimants in both cases. The two suits were tried together, and a decree was rendered in each awarding possession to the respective libellants. From these decrees the present appeals were taken.

The facts are comparatively simple and appear for the most part in the findings embodied in the opinion of the Court below (Rec. No. 650, pp. 76-79\*). There is no conflict of evidence on any point, and the Appellants recognize that the Court "found the essential facts as they were" (Appellants' Brief, p. 42).

The *Appam* is a British passenger and cargo steamship principally engaged since she was built in 1913 in commerce between Liverpool and the West Coast of Africa. She had been used for a short time as a transport but had been in the "ordinary service" of her owners for "over twelve months" before the capture, and was at that time "purely a merchant ship" (Rec., pp. 28, 29). On January 15th, 1916, she was captured in Latitude 33° 10' N., Longitude 14° 24' West, by the German Cruiser *Möwe*, Great Britain and Germany being then and still at war (Rec., p. 76). She had on board a general cargo, sixteen boxes of specie, and 170 passengers, of whom twenty-two were German, eight of them being military prisoners of the British Government, on their way to England as Government passengers.

The *Möwe* stopped the *Appam* by firing a shot across

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\*The references to the Record are to No. 650, unless otherwise stated.

her bows, and then sent an armed crew aboard with bombs, which were slung over her bow and stern. The officers and crew of the *Appam*, except the engine-room force and the second officer, were taken aboard the *Möwe* and kept there in confinement below decks until January 17th, when they were sent back aboard the *Appam*, together with about 150 other persons taken by the *Möwe* from other vessels previously sunk.

The *Möwe* had "a lot of prisoners" aboard (Rec., p. 58) and it is evident that one purpose of capturing the *Appam* and sending her off across the Atlantic to an American port was to get rid of these prisoners and set the *Möwe* free to continue her career of devastation without impediment and without the speedy discovery of her whereabouts which would have followed had the *Appam* been sent to a nearby port. She could not have been sunk because the *Möwe* was already loaded to capacity and there was apparently no other way to provide for the *Appam's* passengers short of drowning them. It would take two weeks for the *Appam* to reach America. Meanwhile the *Möwe* could ravage the seas, unhindered and undiscovered.

The Chief Engineer of the *Appam* and her own engine-room force were required to operate the engines, the German officers threatening to blow out the brains of the engineer and to blow up the ship in the event of disobedience. Bombs were placed for this purpose in the engine room, on the bridge, in the chart room and elsewhere. The specie was removed and taken on board the *Möwe*. The appellant Berg, with a crew of twenty-two men, was placed in charge of the *Appam* with written instructions from the commander of the *Möwe* to bring the *Appam* "into the nearest American harbor and there to lay up" (Rec., p. 62). At this time the *Appam* was 130 miles from the Madeiras, the nearest port, 1590 miles from Emden, the nearest German port, 1450 miles from Liverpool, her home port to which she was bound, and 3051 miles from Hampton Roads, the port to which she was sent "to lay up."

For two days following the capture, the *Appam* remained near the *Möwe* and then started westward, continuing on a westerly course until she arrived at the Virginia Capes on January 31st. There is no claim or suggestion that this course was dictated by stress of weather or scarcity of coal or provisions. It must have been selected in order to keep the facts secret as long as possible, and to escape the recapture which was imminent, if not inevitable, if any attempt were made to take her to Emden. She was navigated by Berg and the German crew; the former German prisoners (except two who went on board the *Möwe*) acted as lookouts and armed guards; her own crew kept the decks clean and her own engine room force operated the engines under duress. The prize crew was "insufficient of itself to operate the ship" (Appellants' Brief, p. 22 and see Rec., p. 29). Berg himself was a lieutenant of the German Naval Reserve (Rec., p. 67), but it does not appear what were the qualifications of any of his crew.

On February 1st, 1916, the *Appam* was brought to anchor in Hampton Roads. It was necessary to invoke the assistance of her own crew for this purpose (Rec., p. 23). Berg reported his arrival to the Collector and filed with him a copy of his instructions to bring the *Appam* "into the nearest American harbor and there to lay up" (Rec., p. 62). On the following day, the German Ambassador informed the State Department of Berg's intention to remain in American waters and made the startling request that certain of the British passengers transferred from the *Möwe* to the *Appam* and the crew of the *Appam* herself should be interned in the United States during the remainder of the war (Rec., p. 17). This extraordinary application was promptly denied and the prisoners were released by order of the United States authorities (Rec., p. 19). There was no suggestion that the *Appam* was unseaworthy or short of provisions or was driven in by stress of weather and no request was made for an opportunity to make repairs or obtain provisions. A survey made by order of the Court



on April 14, 1916, showed affirmatively that the vessel was seaworthy and needed no substantial repairs (Rec., pp. 12, 13).

No offer or attempt to depart was made, and in fact Berg and his crew of twenty-two could not navigate and work the ship, nor could the crew be augmented to adequate numbers without a manifest violation of neutrality and of the criminal statutes of the United States, by organizing a military expedition to take home the spoils of war.

After waiting two weeks, thus giving Berg and his crew full opportunity to depart with their prize, if able and willing to do so, the owners of the *Appam* filed their libel on February 16th, 1916. On March 13th, 1916, a libel was filed against the cargo by the Master of the vessel.

By the pleadings as finally amended it was alleged on behalf of the libellants that the holding and detaining of the *Appam* in an American port was a violation of the neutrality of the United States. It was claimed by the respondents that the *Appam* was brought in as a prize by Berg, as Prize Master, relying on the Treaty of 1799 between the United States and Prussia; that the length of his stay was not a matter for determination by a judicial tribunal of the United States; that proceedings were pending in a German Court for condemnation of the vessel and her cargo as prize of war; and that the American Court had no jurisdiction.

The German Ambassador also requested the State Department to ask the Attorney General to instruct the local United States Attorney to appear before the Court and secure the dismissal of the libel. The Secretary of State replied that the question of jurisdiction was one for the Court to decide, but as a matter of courtesy requested the Attorney General to instruct the United States Attorney to present to the Court a copy of the Ambassador's note, which was accordingly done (Rec., pp. 19, 5-7). The Secretary of State also informed the German Ambassador that "in the opinion

of the Government of the United States \* \* \* the case of the *Appam* does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while *en route* to the places named in the commander's commission, but not the deposit of the spoils of war in an American port." (See Note of Secretary Lansing of March 2, 1916, Rec. p. 19.)

In a later communication to the German Ambassador, the Secretary of State again refused to interfere with the Court proceedings. He provisionally agreed to arbitrate the question of the status and rights of the *Appam*, but only upon condition that, *if the libel should be dismissed*, the *Appam* should depart from the territorial jurisdiction of the United States "after she has had a reasonable time to take on board such supplies as may be necessary in the judgment of this Government for a voyage to the nearest port subject to the sovereignty of Germany; and *failing this that she be released* and the prize master and crew be interned for the remainder of the war" (Rec., p. 24). It was proved on the trial that the *Appam* could have been coaled and provisioned at Newport News inside of forty-eight hours for a long voyage (*Id.*, p. 60).

In the cargo case the perishable portion of the cargo was sold by order of the Court for upwards of \$600,000 and the proceeds deposited in the Registry (Rec. No. 722, p. 33). In the hull case the vessel herself was appraised at \$1,250,000 (Rec. No. 650, p. 94).

The two cases were tried together in May, 1916. No witnesses were called by the respondents, although "Berg was present in Court during the entire trial" (Rec., p. 79) and the testimony of libellants' witnesses was thus wholly uncontradicted.

On July 29th, 1916, the Court handed down an elaborate opinion, sustaining the libels, and holding that under the circumstances as shown the *Appam* had no right to come into or remain in American waters; that her coming and her presence constituted violations of

American neutrality; that she could not leave without augmenting her crew and could not augment her crew without further violating American neutrality; that this condition was equivalent to abandonment; that the capture, the flight to an American port (twice the distance to the nearest German port) and the entry into such port to escape recapture was "one continuous occurrence," constituting a violation of neutrality; that the Prussian Treaty of 1799 did not apply and had been correctly so construed by the State Department; and that the pendency of prize proceedings in a German Court was immaterial (Rec., p. 93).

Restitution of both ship and cargo was awarded, and decrees were entered accordingly. In the hull case (No. 650) an appeal was taken and allowed immediately in open Court and the execution of the decree was stayed pending the appeal upon appellants giving a supersedeas bond in the sum of \$2,000,000. The vessel was retained in the custody of the Court below, subject to all orders thereof "looking to her proper care and preservation" (Rec., p. 95). Prior to the signing of the decree the libellant asked for the delivery of the vessel and offered to give such bond as the Court should require, but this application was denied (*Id.*, p. 95). The vessel remains in the legal custody of the Court but with Berg and his German crew still on board. Her safety is assured only by the appeal bond and the German Ambassador's representations to the State Department that "no attempt to run the vessel (the *Appam*) away will be made so long as the said ship remains under the custody of said Court" (Rec., p. 7)—a *chose* in action, and a "scrap of paper"—poor substitutes for the vessel herself.

Execution of the decree in the cargo case was also stayed upon appellants giving security in the sum of \$30,000. The proceeds of the sale of part of the cargo are still in the Registry of the Court and the unsold portion is in the custody of the Marshal (Rec. No. 722, p. 35).

The appeal in the hull case was taken on August 8, 1916, and in the cargo case on September 28th, 1916. The Records were filed in this Court on September 5th and October 14th respectively. As the appellants did not move to advance the appeals for argument such motions were made by the appellees and the two causes have been set down together for January 8th, 1917.

### The Questions at Issue.

The appellants' brief argues at some length various questions which are not involved in this case, especially in connection with the technical validity of the original capture, and undertakes to demonstrate certain undisputed propositions, as, for example, that the jurisdiction of prize causes is vested exclusively in the Courts of the captor's government, and that the mere entry of a prize into neutral waters is not necessarily a breach of neutrality.

The question here is not "prize or no prize"; these suits were brought on the *instance* side of the Court; the question is simply whether there should be restitution for a violation of neutrality subsequent to the actual capture.

The arguments of appellants on this question reduce themselves in effect to the following:

A.—That the only violation of neutrality for which the Courts of a neutral country can restore a prize is one inherent in the captor's character or in the capture itself, and that no subsequent violation of neutrality can be considered.

B.—That by the capture, the title to the *Appam* vested in the German Government, and she thereby became a public vessel of the German Empire and hence exempt from the jurisdiction of our Courts.

C.—That under the Prussian treaty the *Appam* had a right to come into an American port alone and not under

convoy and "there to lay up" indefinitely or during the war.

D.—That in any event she had a right to stay until ordered to leave, and did not violate neutrality meanwhile.

E.—That the Hague Convention (XIII) has no bearing on the case.

### **Brief of the Argument.**

The appellees' answer to appellants' contentions may be summarized as follows:

1. Prizes may be brought into a neutral American port only on account of unseaworthiness, stress of weather or lack of fuel or provisions.

2. If they enter under other circumstances or remain after the necessity therefor has passed they violate American neutrality.

3. Articles 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of accepted international law on this subject, and embody the American practice as shown by our history and our jurisprudence.

4. The rejection by the United States of Article 23 was notice to the world that this country would not permit the sequestration of prizes in American ports, or their entry therein, except as allowed by Article 21.

5. Where a prize is brought into a neutral American port, the admiralty courts may take jurisdiction of a suit on behalf of the owners, and award restitution if there has been a violation of neutrality in connection therewith, whether inherent in the capture or prior or subsequent thereto.



6. The Prussian Treaty of 1799 (Art. XIX) as continued by the Treaty of 1828, does not prevent the application of these general rules of international law.

a. It relates only to sending in prizes under convoy of a war vessel.

b. It does not permit an indefinite stay in an American port, but contemplates a timely departure to the destination named in the commission of the captor vessel's commander.

c. If construed and applied in this case as appellants contend, it would involve a violation of the neutrality of the United States towards Great Britain.

7. Full title to a prize, whether neutral or belligerent, does not vest until the prize has been brought into a port subject to the captor's sovereignty and duly condemned in a proper judicial proceeding. Meanwhile, the prize may be lost by recapture, abandonment or violation of neutrality; these are necessary incidents to the *status* "prize."

8. Until condemnation, or other express conversion, a prize remains in a separate category, and does not become a public vessel exempt from neutral jurisdiction.

9. Sending a prize into a neutral port with a prize crew insufficient to navigate her safely, and for the express purpose of laying up, is equivalent to an abandonment as well as a violation of neutrality.

10. A violation of neutrality sufficient to require restitution by the courts of a neutral nation may be of neutrality as defined in express statutes or as recognized in international law; as for instance by a capture in neutral waters or by an illegally augmented crew, or by an attempt to use a neutral harbor as a place of depot for the spoil of war, or in any other way as an aid to belligerent operations.

## POINT I.

It is the general rule of International Law that prizes may not be sequestered in a neutral port pending condemnation proceedings in the Courts of the captor's country. Unless expressly excluded, prizes may seek temporary shelter in a neutral port, but not permanent or indefinite asylum.

This rule is the product of a long course of historical development in the various maritime countries.

French ordinances of 1543, 1674 and 1689 forbade all commanders of vessels of war to send or allow to go to foreign countries any of the prizes which they might make. During the 18th century, there were some variations from this rule, but in the French Prize Code of 1784 it was provided that "no prize shall be taken into a foreign port save for absolute necessity." (See Naval War College, International Law Situations, 1908, p. 54, also Appendix to 5 Wheaton, pp. 52-58.)

In 1650, and again in 1681, France prohibited the stay of foreign prizes in her ports for more than 24 hours. (See Pistoye & Duverdy, *Traité des Prises Maritimes*, Vol. 2, p. 449, 452.) This is, perhaps, the origin of the 24 hour limitation for belligerent war vessels in neutral ports.

By an edict of the States General of Holland of November 7, 1658, it was declared:

"That no prize ship should be brought into the port itself, but merely into the outer roads, where she might be *sheltered from danger*, and that nothing should be unladen or sold out of her; and if anyone should act to the contrary, *the prize should be restored to the former owner as though it had never been taken*, and the captor himself should be detained and his own vessel seized and confiscated."

(See note to the *Josefa Segunda*, 5 Wheat., at p. 349, citing Duponceau's Translation of Bynkershoek.)

This is evidently one of the very early expressions of the rule which crystallized 250 years later at the Hague as Article 22 of Convention XIII.

The English authorities recognize the same general rule and treat any departures from it as exceptional and irregular.

In the *Flad Oyen* (1 C. Rob., 135), Lord Stowell explicitly condemned the practice of sequestering and proceeding against prizes in a neutral port:

"It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war within their cities, would be to make their coasts a station of hostility."

The same Judge said in the *Henrick and Maria* (4 C. Rob., 43):

"Upon principle, therefore, it is not to be asserted that a ship brought into a neutral port is with effect proceeded against in the belligerent country. The *res ipsa*, the *corpus*, is not within the possession of the court; and possession, in such cases, founds the jurisdiction."

In *The Polka*, Spinks, Ecclesiastical and Admiralty Reports, 447, Dr. Lushington said:

"The circumstances under which the present application is made are quite peculiar and form an

exception to the general principle upon which this court proceeds. Though there is no direct evidence that the vessels are Russian, yet there is no claim, and the court entertains no doubt upon the subject I have no hesitation in condemning them; and, looking at the fact deposed to, that they are not in a fit state to be brought to England, *and the consent of the Prussian Government to their sale at Memel*, the Court will allow that course in the present case, but with the proviso that the wishes of the Prussian Government shall be fully observed with respect to the sale.

I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captor's country, and the court must guard itself against allowing a precedent to the contrary to be established."

The express consent of the neutral Government was here the controlling factor.

The German Prize Code expressly imposes the same regulations upon German naval commanders:

"III. Bringing in of Prize. The commander provides for bringing the vessel into a German port, or the port of an ally, with all possible despatch and safety. A prize may be brought into a neutral port only if the neutral power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel and supplies. In the latter case she must leave as soon as the cause justifying her entrance ceases to exist.

The commander gives to the officer of the prize crew the necessary written instructions in regard to

*the voyage and makes up the crew so as to enable the officer to bring in the vessel."*

German Prize Code, Huberich & King, pp. 64-65.

This provision of the German Prize Code, with certain others, was offered in evidence at the trial, and will be found in the Record at pp. 75, 76. The Trial Court excluded it as evidence, but it is open to this or to any other Court as a legitimate source of information in regard to the officially prescribed practice of Germany on a question of international law.

There is also a striking agreement of opinion among the leading text writers on the subject.

In Wheaton's treatise on Capture, written in 1815, it is said at p. 262:

"Without entering into a discussion of the various opinions that have been thrown out on this subject, better opinion and practice may be stated to have been that a prize should be brought *infra praesidia* of the capturing country, where by being so brought it may be considered as being incorporated into the mass of national stock. The greatest exceptions that have been allowed, have not carried the rule beyond the ports or places of security *belonging to some friend or ally in the war who has a common interest in defending the acquisitions of the belligerent, made from the common enemy of both.*"

And at p. 263:

"By the regulations of France, foreign ships are forbidden to enter with prizes into the ports of France, except in cases of distress, and they are permitted to stay no longer than this necessity exists. *Valin observes on this article that such a rule is exactly conformable to the laws of neutrality*



*and Hubner admits that a wise hospitality will not be exercised beyond this."*

In Dana's note to Wheaton on International Law (1806), the rule is admirably stated as follows:

*"The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in case of necessity; and they may remain in the ports only for a meeting of the exigency. The necessity must be one arising from perils of the seas, or in need of repairs for seaworthiness, or provisions and supplies. The neutral will protect the prize against pursuit from the same port for twenty-four hours and against capture within its waters, but beyond that a general peril of war arising from the power or vigilance of the other belligerent does not constitute a necessity which the neutral recognizes as justifying the remaining in his port. This rule, if adhered to, will prevent the arising of a custom of retaining prizes in safety in a neutral port, until they can be condemned in the home port, in their absence. But, apart from any such practice of neutrals, it seems clear, that to allow prizes to fly to a neutral port, and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts in neutral ports. It seems, therefore, to be the tendency, if not the settled rule, now, that a decree of condemnation will not be passed against prizes remaining abroad, unless in case of necessity, or if passed, will not be respected by other nations."*

(Wheaton's Int. Law, 8th Am. Ed., Sec. 391.)

In Hall on International Law, it is said:

*"But it is now usual for the neutral state to restrain belligerents from bringing their prizes*

into its harbors, except in cases of danger or of want of provisions, and then for as short a time as the circumstances of the case will allow." (Int. Law, 5th ed., p. 618.)

Westlake, referring to the practice of condemning prize vessels lying in a neutral port, says that this "seems to be unsound in principle. To be a proper subject of adjudication a prize must have been brought *infra prae-sidia*, which is not the case while she lies in a neutral port in which any forcible control of her ought not to be allowed by the territorial sovereign." (Westlake, International law, Part II, p. 215).

In Risley on the Law of War, the same idea is expressed (p. 176):

"On the whole it seems likely that the practice of excluding the prizes of both sides, except in case of necessity, will be adhered to in future. Such a course is, in fact, almost a necessary corollary of the strict rules which either already regulate or are likely to regulate, the admission of belligerent public vessels other than prizes into neutral waters and ports in time of war."

In an article by Dr. James Brown Scott, published in the American Journal of International Law, January, 1916, pp. 104-112, he says (p. 108):

"In any event, neutrals should not allow their ports to be a depository for the spoils of war."

Bluntschli, the great German authority on international law, in treating of the subject of neutrality and neutral territory, says (International Law, Sec. 778, Note):

"To allow its territory to be used for military operations by one of the belligerents evidently constitutes an illegal aid and assistance. The question has been warmly discussed whether the neutral

state should permit prizes to be provisionally placed in safe-keeping in its ports. The United States had accorded by a treaty this privilege to France at a time anterior to their laws on neutrality. If this act has for its object to afford the vessel shelter from the dangers of the sea, its character is entirely pacific and cannot be looked upon as a violation of neutral duty. *If, on the contrary, the victor brings his prize into a neutral port in order to make her more safe and so that he may fly the more quickly to new conquests, he would be using the neutral territory as a base of operations, which could not be tolerated.* The neutral state should then, in order clearly to indicate its intention to remain neutral, refuse the entry of its ports to all prizes taken by belligerents, *unless there is a question of ships in distress."*

During our own Civil War and in our war with Spain, and again in the Russo-Japanese War in 1904, the neutral nations generally either excluded prizes, or allowed only temporary entrance in cases of necessity.

In the British Foreign Office, June 6th, 1861, Lord John Russell instructed the Admiralty as follows:

*"Her Majesty's Government are, as you are aware, desirous of observing the strictest neutrality in the contest which appears to be imminent between the United States and the so-called Confederate States of North America, and with the view more effectually to carry out this principle they propose to interdict the armed ships and also the privateers of both parties from carrying prizes made by them into the ports, harbors, roadsteads or waters of the United Kingdom, or of any of Her Majesty's colonies or possessions abroad."*

Similar instructions were addressed on the same day to the Secretary of State for India, and the colonies. Circular instructions to Governors of colonies respect-

ing the treatment of prizes captured by Federal or Confederate cruisers if brought into British waters were as follows:

"Downing Street, second of June, 1864. I think it well to communicate to you the decisions at which Her Majesty's Government have arrived on certain questions which have arisen respecting the treatment of prizes captured by Federal or Confederate cruisers if brought into British waters; (1) If any prize captured by ship of war of either of the belligerent powers shall be brought by the captors within Her Majesty's jurisdiction, notice shall be given by the Governor to the captors immediately to depart and remove such prize. (2) A vessel which shall have been actually and *bona fide* converted into and used as a public vessel of war shall not be deemed to be a prize within the meaning of these rules. (3) If any prize shall be brought within Her Majesty's jurisdiction through mere stress of weather or other extreme and unavoidable necessity, the Governor may allow for her removal such time as he may consider to be necessary. (4) If any prize shall not be removed at the time prescribed to the captors by the Governor, the Governor may detain such prize until Her Majesty's pleasure shall be made known. (5) If any prize shall have been captured by any violation of the territory or territorial waters of Her Majesty, the Governor may detain such prize until Her Majesty's pleasure shall be made known. \* \* \* *These rules are for the guidance of the executive authority and are not intended to interfere in any way with the process of any court of justice.*"

Bernard's History of British Neutrality, pages 137-141.

France made a declaration regarding prizes very similar to that issued by Great Britain and the apposite sections read as follows:

"Paris, 10th of June, 1861. The Minister of Foreign Affairs has submitted to the Emperor the following declaration, to which His Majesty has given his approval \* \* \* (1) No ship of war or privateer of either belligerent will be permitted to remain with its prize in our ports or harbors for more than twenty-four hours, save in the case of *relâche forcé*. (2) No sale of goods coming from a prize can take place in our ports or harbors.  
 NAPOLEON."

The Belgian authorities provided that privateers and their prizes should not be allowed to enter Belgian ports "except in case of imminent perils of the sea" and that the authorities should "compel them to put to sea again as soon as practicable."

The Netherlands made similar provision.

Spain provided in its neutrality proclamation of June 17th, 1861, Article III:

"It is forbidden to vessels of war or privateers with their prizes to enter or to remain for more than twenty-four hours in the ports of the Monarchy, except in case of stress of weather. Whenever this last shall occur, the authorities will keep watch over the vessel and oblige her to go out to sea as soon as possible, without permitting her to take in any stores except those strictly necessary for the moment, but in no case arms or supplies for the war. \* \* \* (4) Articles proceeding from prizes shall not be sold in the ports of the Monarchy."

A similar provision was made by Portugal and the Hawaiian Islands.

Bremen, at that time a free State, provided:

"The Senate finds it necessary in regard to the events which have occurred in North America to



renew the regulations contained in its ordinance of April 29, 1854, and accordingly makes the following notification for general observance \* \* \*.

(2) The proper officers are ordered not on any account to allow the fitting out or provisioning of privateers under whatever flag or carrying any letters of mark in any port of the Bremen territory, nor to admit into Bremen ports any such privateers or the prizes made by them, except in cases of proved stress of weather at sea. Resolved at Bremen in the Assembly of the Senate on the 2nd, published on the 4th of July, 1861.

The free city of Hamburg promulgated a like ordinance.

During the Spanish war of 1898 the Navy Department of the United States issued the following instructions:

"Sending in of prizes. 20. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

24. *The title to property seized as prize changes only by the decision rendered by the prize court.* But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court."

In 1898 Brazil provided that no war ship of any character should be permitted to enter and remain, with prizes, for more than 24 hours, or be permitted to dispose of its prizes or of articles coming therefrom.

The Dutch West Indies forbade the entry of prizes "except in case of accidents of the sea or want of provisions."

France again proclaimed that no ship of war of

either belligerent "will be permitted to enter and to remain with her prizes in the harbors and anchorages of France, etc., except in case of forced delay or justifiable necessity. No sale of objects gained from prizes shall take place in the said harbors and anchorages."

Great Britain provided that "armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbors, roadsteads, or waters of the United Kingdom."

Italy, which had made a similar proclamation in 1864, repeated it in 1895.

Japan in 1898 proclaimed that no man of war should be permitted to take any captured vessel into the territorial waters of the Empire, except under stress of weather, or on account of disablement or of destitution of articles necessary for navigation. And it was expressly forbidden in the last-mentioned case to dispose of the captured vessel or articles.

The Netherlands and Portugal made a like proclamation in 1898, as did Denmark and Sweden in 1904. (For the foregoing proclamations, etc., see Naval War College; Int. Law Situations; 1908, pp. 70-73; also Am. Journal of Int. Law, January, 1916, p. 109 *et seq.*)

It is thus clear from this review of the acts of modern states that there is an extraordinary consensus of opinion on the subject. It is rare to find such unanimity upon any international question as is found in that relating to asylum for prizes in neutral ports. As international law must ultimately be founded upon the consent of nations, this universality of practice furnishes the very best evidence to sustain our position that the law of nations generally forbids a prize to be sent into a neutral port to be detained there during the continuance of the war. All these proclamations are predicated upon the necessity of maintaining a strict neutrality, and the fundamental basis of neutrality would be violated were it possible for a belligerent to use neutral ports as an asylum for its prizes.

Had the German authorities sent a hundred prizes instead of one into Newport News, it would have been evident that they were using that harbor as a real base of operations. Permission so to use it on the part of the Government of the United States would constitute a very real breach of neutrality and violate our treaties, as well as our law. In principle, of course, the case is not otherwise where only one or two vessels are sent in. Should our courts take the contrary view some U-53 might soon fill New York Harbor with British and neutral prizes.

## POINT II.

The provisions of Articles 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of the existing law of nations. The express refusal of the United States to accede to Article 23 was notice to the world that this country would not allow the sequestration of prizes in our ports.

On October 18, 1907, at The Hague was signed Convention XIII, concerning the rights and duties of neutral powers in naval war.

Scott's Hague Conventions and Declarations, p. 208.

When ratified by our Treaty Making Power it became part of our law. It was law for us on August 1, 1914. *It is the measure of our duties to-day*, although Article 28 may preclude the belligerents from invoking its clauses as conferring specific *treaty* rights, because some of the other present belligerents were not parties thereto.

An examination of this whole Convention further indicates that it is in effect declaratory of the generally existing usage of modern times. The underlying object of the Convention was to prevent the use of neutral harbors as in any way furnishing a base for warlike operations. The Convention recites in its preamble:

"in cases not covered by the present Convention, it is expedient to take into consideration the general principles of the law of nations;"

\* \* \*

"the Powers should issue detailed enactments to regulate the results of the attitude of neutrality;"

\* \* \*

"it is, for neutral Powers, *an admitted duty to apply these rules impartially to the several belligerents;*"

\* \* \*

"these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except in case where experience has shown the necessity for such change for the protection of the rights of that Power."

In regard to the violation of territorial waters, Article 3 provides:

"When a ship has been captured in the territorial waters of a neutral Power, this Power must employ \* \* \* the means at its disposal to release the prize with its officers and crew, and to intern the prize crew."

Article 5 provides that

"Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries."

Article 9 enjoins impartiality between the belligerents. Belligerent warships may not remain in the ports of a neutral Power for more than twenty-four hours (Article 12).

Article 14 provides that

"A belligerent warship may not prolong its stay in a neutral port beyond the permissible time except

on account of damages or stress of weather. *It must depart as soon as the cause of the delay is at an end.*"

It is thus evident that no request to depart is necessary to be given by the neutral government, but that if the vessel does not depart of itself, when the time limit is up, it remains in violation of the law.

Article 17 provides that the repairs to belligerent warships must be only such as are

"absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay."

It is also provided that the revictualing of the vessels may also only be up to such extent as to bring their supplies up to the peace standard and that only sufficient fuel may be taken on to enable them to reach the nearest port in their own country (Art. 19).

The following articles apply specifically to prizes:

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Article 22. *A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.*

Article 23. *A neutral Power may allow prizes to enter its ports and roadsteads, whether under con-*



voy or not, when they are brought there to be sequestrated pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a warship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty."

Articles 21 and 22 were ratified and adhered to by Belgium, France, Austria-Hungary, Germany, the United States, and a number of others, and signed but not ratified by Great Britain. It is significant that as to Article 23 reservation was made by Great Britain and the United States, as also by Japan and Siam. The German Prize Code embodies Articles 21 and 22 *in ipsissimis verbis*, but makes no mention of the permissive innovation contained in Article 23.

The act of adhesion of the United States contains the following reservation (Scott, *Id.* p. 219):

"That the United States adheres to the said Convention, subject to the reservation and *exclusion of its Article 23* and with the understanding that the last clause of Article 3 thereof implies the duty of a neutral Power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." (See also 36 U. S. Stat. Pt. II, p. 2438.)

The policy of the United States, as well as that of Great Britain, is clearly shown by Articles 21 and 22 which were signed, adhered to or ratified by forty-three of the Powers. This is indicative of the very general agreement among the nations that these articles declared existing international law. The German Prize Code is equally convincing.

Article 23 is evidently inconsistent with Articles 21 and 22 and contrary to the general rule of neutrality and the modern practice developed by the nations. The

attitude of the United States in its reservation indicates its disavowal of the proposed innovation.

It is to be noted, however, that even if Article 23 were law, it would not allow the *Appam* to remain in the ports of the United States unless our Government permitted this to be done by some positive action, nor would permission in specific cases be sufficient.

Article 23, taken in connection with the whole of the Convention, merely provides that a neutral nation, at or before the outbreak of the war, may permit that its ports be so used, and that, where such permission has by law been given, such use of its ports will not be considered a violation of neutrality.

The United States was evidently unwilling to admit the *right* of a neutral to *permit* its ports to be so used. This innovation the delegates voted against and the Senate rejected. We are now told by the appellants that it is our law and that our Government has opened our ports as an asylum for prizes—Where and how?

The "order to leave" mentioned in Article 21 refers to vessels driven in by *vis major*; it has no application to the case of a vessel sent to "lay up" in a neutral port, whose very *coming in was unlawful*.

The illegality involving release foreseen in Art. 21 begins when the vessel is in condition to depart; that aimed at in Art. 22 is the initial illegality involved in coming in. The *Appam's* entry into Hampton Roads was not caused by the weather, but by the orders of the German commander of the *Möwe* given two weeks before. The distinction is capital and vitiates the ingenious argument of appellant that the *Appam* was not outlaw merely because she came "over the line."

Dr. Scott in his work on the Peace Conferences of 1899-1907, fully explains the point of view of the United States as to Convention XIII, and gives the entire text of the Report of the American Delegates, of whom he was one. In this Report it is stated:

"It was constantly borne in mind by the delega-

tion, in all deliberations in committee, that the United States is, and always has been, a permanently neutral power, and has always endeavored to secure the greatest enlargement of neutral privileges and immunities. \* \* \* The delegation of the United States gave constant support to the view that stipulations having for that purpose the definition of the rights and duties of neutrals should, as a rule, take the form of restrictions and prohibitions upon the belligerents, and should not, save in case of necessity, charge neutrals with the performance of specific duties." (Vol. II., pp. 237, 238.)

Again referring to the Articles of the Convention as to belligerent prizes in neutral waters, the American Delegates reported:

"Articles 21 to 25 relate to the admission of prizes to neutral ports. Articles 21 and 22 seem to be unobjectional. Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. *This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse and should not be approved.* In this connection it is proper to note that a proposition absolutely forbidding the destruction of a neutral prize, which was vigorously supported by England and the United States, failed of adoption. Had the proposition been adopted, there would have been some reason for authorizing such an asylum to be afforded in the case of neutral prizes." (*Id.* Vol. II, p. 240.)

The Report further says:

"The second paragraph of Article 3 and Article 23 should not be approved." (*Id.* Vol. II, p. 241.)

The Report continues:

"A careful examination of the Convention as a whole and in all its parts leads to the conclusion that its ratification is in the interest of neutral Powers, but that in such ratification it is suggested that the second paragraph of Article 3 and Article 23 be rejected." (*Id.* Vol. II, p. 242.)

On April 17th, 1908, the Senate of the United States, in Executive session, advised and consented to the ratification of the Convention:

*"reserving and excluding, however, Article 23 thereof, which is in the following words:*

*'A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.*

*'If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.*

*'If the prize is not under convoy, the prize crew are left at liberty.'* (*Id.* Vol. II, p. 523.)

Dr. Scott, who may be regarded as in effect the official historian for the United States of the Conference of 1907, says, in discussing the rights and duties of neutral nations in connection with the various articles of the Convention, Vol. I, p. 644, *et seq.*:

*"The neutral does not look with favor upon the entry of prize within its jurisdiction, and while Article 21 of the convention does not in express words permit the prize to enter freely, it recognizes that 'unseaworthiness, stress of weather or want of fuel or provisions,' may justify entrance. The reason for this is simple, namely, that an entry in such a case cannot be considered as the result of design or premeditation. It is in its nature accidental and necessary. However, the neutral port must not be*

*made a port of entry for prize, and the prize entered must not remain permanently, otherwise, the neutral port becomes a basis of hostile operations.* Therefore, the prize must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew (Article 21).

The reason for this action is simple. The prize was only permitted to enter by reason of the existence of certain circumstances. The moment these cease to exist the presence of the prize is unlawful. In the language of law, it is a trespasser and is treated accordingly.

In the absence of what may be called attenuating circumstances, namely, unseaworthiness, stress of weather or want of fuel or provisions, *the prize cannot enter neutral jurisdiction. If it does, it violates neutrality* and the express provision of Article 22 which requires that a neutral power must release the prize brought into one of its ports under any other circumstances than those just specified.

The provisions of Article 23 are seemingly at variance with the two previous articles; for a neutral power is authorized to allow prizes to enter its ports and roadsteads with or without convoy, to await the decision of a Prize Court of the captor country. The advisability of this provision is questionable. If a belligerent cannot conduct the prize to its home country, the prize should be released. A neutral port should not be used as a substitute. Whatever language be used, the fact remains that *the neutral port serving as a basis of hostile operations for the capture of a prize commits a hostile act, and the storing of a prize in a neutral port is in aid of a hostile act.*"



Dr. Scott also says:

"The older practice found the essence of neutrality to consist in extending an equal right to both belligerents; the modern doctrine insists that the neutral shall no longer suffer; it must prevent a hostile act by either belligerent within its territory. It is not a party to the war, it cannot be made to render assistance or its territory used without becoming a party.

It therefore follows that capture by either belligerent within neutral waters is not only a violation of neutral sovereignty but of neutrality as well, because, if permitted, neutral territory is at once made the basis of hostile action." (p. 622.)

He then discusses the whole subject, together with the injustice that may be done to a weak nation which dare not protest against captures, and he rehearses the American precedents beginning with the capture of the *General Armstrong* in 1812.

He cites Commodore Stewart's case (1 Ct. Cl., 113) in the Court of Claims (1864). He also cites with approval the language of Sir William Scott, to wit:

"When the capture within the neutral territory is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding it may actually belong to the enemy."

*The Vrouw Anna Catharina*, 5 Rob. 15 (1803).

Also the cases found in

Moore's International Law Digest, Vol. 1, 366,  
Vol. VII, 937.

Also

Hershey's Int. Law and Diplomacy of the  
Russo-Japanese War, pp. 258-263.

In a very recent article in the American Journal of International Law Dr. Scott says: "In adhering to the convention the United States accepted Articles 21 and 22, but specifically excluded Article 23. In so doing it declared its attitude, and the deposit of the instrument of adherence at The Hague in accordance with the terms of the treaty was *notice to the world of its attitude in the matter of prize.*" (Am. Journal of Int. Law, Oct., 1916, p. 818.)

Mr. Charles C. Hyde discusses the various articles of Convention XIII in the Journal of International Law for July, 1908, at a time when the judgment of publicists was not swayed as it may well be to-day by the war. Speaking of Art. 21, he says:

"It is well that there was embodied in the last paragraph of Article 21, the provision charging the neutral in such case with the duty not merely to order departure, but also in case of necessity to employ all available means to release the prize with its officers and crew and to intern the prize crew. That the performance of such a duty is but an exercise of right possessed by the neutral is not to be doubted."

Admiral Stockton in his Outline of International Law (1914), referring to the policy of the United States and the action of our delegates at the Hague Convention, says:

"The refusal to allow the above aid (asylum) to a belligerent as to prizes in war time is in accordance with the impartial position of the United States as a neutral power and in accordance with British usage. It would enable the belligerent cruiser to carry on operations without the inconvenience of sending prizes to home ports." (p. 408.)

The Admiral, in speaking of capture in neutral waters cites Article 3 of Convention XII of the second Hague

Conference, ratified by the United States, which provides that judgments can be brought before the international prize court in case of an enemy's ship captured in the territorial waters of a neutral power when that power has not made the capture the subject of a diplomatic claim. In referring to the case of the *Sir William Peel*, 5 Wall. 517, where it was held that unless the nation in whose territorial waters the capture had been made appeared, the courts of the United States would not consider such violation of neutrality ground for restitution, he points out that the International Commission to which this case was finally referred took a view directly contrary to that of the Supreme Court of the United States. The award of the Commission was made upon the ground "that the capture within neutral waters of Mexico was absolutely illegal and void." (*Id.* pp. 400, 401.)

An examination of the discussions as to Article 23 in the Proceedings of the Hague Convention indicates that the article was debated and decided upon as a compromise measure. It was debated mainly in connection with the question of the destruction of prizes. The article was proposed by the Italian Delegation with the expectation that its adoption might offer a way out for those who maintain the right to destroy neutral prizes in certain cases of necessity. The significance of the discussion is that while all agreed on 21 and 22 as expressing existing law, Article 23 was debated as an innovation, and from the standpoint of policy. These debates disclose the fact that Great Britain and the United States stood for the codification of existing International Law as finally embodied in 21 and 22; Germany also acquiesced, proposing to add to the original draft of Article 21 the words: "for lack of provisions or fuel." This amendment was accepted. The German delegation evidently followed the view of their Government as now embodied in their present Prize Code.

The adhesion of the United States to Articles 21 and 22 was clearly no accidental compromise, but was done in pursuance of the fixed policy of this country and that of other nations, as shown by their definitely proclaimed practice, at least since the middle of the 19th century.

As pointed out in Oppenheim on International Law, only by adhering to this practice can neutrality be preserved. He says:

"It has long been universally recognized that the duty of impartiality must prevent a neutral from permitting a belligerent to set up Prize Courts on neutral territory. The intention of a belligerent in setting up a court on neutral territory can only be to facilitate the plundering by his men-of-war of the commerce of the enemy. A neutral tolerating such Prize Courts would therefore indirectly assist the belligerent in his naval operations." (Vol. 2, p. 395.)

He explains that since 1793, when M. Genet attempted to organize French Prize Courts in American territory, it had become admitted that such proceedings were unlawful, and therefore, "Article 4 of Convention XIII enacts this formerly customary rule."

*"It would no doubt be an indirect assistance to the naval operations of a belligerent if a neutral allowed him to organize on neutral territory the safe-keeping of prizes or their sale."* (p. 396.)

Oppenheim therefore approves Art. 21 and 22 of Hague Convention XIII, and says:

"While the stipulation of Art. 21 cannot meet with any objection, the stipulation of Art. 23 of Convention 13 is of a very doubtful character.  
\* \* \* This rule actually enables a belligerent to safeguard all his prizes against recapture, and a neutral power which allows belligerent prizes access to its ports under the rule of Art. 23 would indi-

*rectly render assistance to the naval operations of the belligerent concerned."* (p. 397.)

This "assistance to the naval operations" of Germany is just what the appellants ask in this case.

### POINT III.

The history of the United States neutrality laws and the circumstances attending their origin clearly indicate that both the policy and the law of the United States prohibit the use of American ports as a depot for spoils, by the safe-keeping therein of foreign belligerent prizes.

After the termination of the Revolutionary War and as a consequence of our Treaties with France, two in number, both of 1778, one of Alliance and the other of Amity and Commerce, numerous and protracted difficulties arose in regard to the bringing by French vessels into American ports of prizes which they had taken.

Article XVII of the Treaty of Amity and Commerce is substantially similar to Article XIX of the Prussian Treaty. (See full text in the Appendix.) It was an outcome of the unsettled and undeveloped ideas of neutrality then existing. Moreover, the treaty itself was one made with an ally, the only friend which this country then had and the only ally it ever had. At that time it was permissible to give to one power or another certain privileges available in wartime. In discussing these Treaties it must be remembered that the evolution of the law of neutrality, which has taken place since that time, especially as a consequence of these exclusive privileges given by the United States to France, wholly negatives this ancient view. The fundamental postulate of neutrality to-day is complete impartiality between the belligerents. This rule, embodied in the original statutes of the United States, and since so firmly adhered to, is not founded



upon "bookish theoretic" but is the resultant of painful national experience.

An interesting and graphic description of the difficulties created by M. Genet during his short but agitated stay as Minister from the French Republic is set forth in McMaster's History of the People of the United States, Vol. II. A vivid account is given of the fitting out of privateers in our ports and of their depredations. Genet arranged to have crews enlisted and vessels fitted out in our ports, took prizes, brought them into American ports and there set up prize courts, presided over by a French Consul. He claimed that he had a right to these exceptional privileges, and he argued that the Treaties were all on his side.

"One article gave to the contracting powers the right to bring prizes into each others' ports. Did not this also include the right to condemn and sell them?

Another article, the twenty-second, forbade either party to suffer the enemies of the other to fit out privateers in its waters. Did not this imply the right of either party to fit out privateers in the ports of the other?" (p. 103.)

"The labor of preserving neutrality, however, was nowhere so difficult as at the seat of Government itself. The whole state of Pennsylvania was strongly Republican. The men in authority from the Governor down to the captains and sergeants of the militia companies were firm supporters of Genet. The very courts became corrupt and rendered decisions which the 'Genetines,' as they were nicknamed, received with wild delight. The Ship *William* of Glasgow had come in as a prize of the Citizen Genet. The French Consul condemned her. The British owners libelled her in the Courts, had her placed in charge of the Marshal and brought the case to trial late in June. To the astonishment of the friends of Justice, the Court discharged the

libel, declaring that the matter was one for the politicians to decide and not the judges." (pp. 107, 108.)

Likewise juries acquitted American citizens who had enlisted and served on French privateers, and public opinion dictated and approved these acquittals.

The decisions of the lower Courts to which McMaster refers were those decisions the authority of which was swept away by the Supreme Court in the famous case of *Glass v. The Sloop Betsey* (*infra*).

The following incident illustrates the difficulties caused by Genet in his reliance upon these exclusive Treaty privileges (McMaster, Vol. 2, p. 136):

"An English craft, taken within the waters of the United States, was sent into the port of Boston by a French privateer. The owners claimed the capture was illegal, libelled the vessel and a United States Marshal was ordered to serve the writ. He climbed up the side of the schooner, found but one man on board, made known his business, and on a hail being given, the prize master and the lieutenant of *La Concord* started for the ship. It was then nine at night. The lieutenant denied the Marshal's right to serve a writ after dark and went back to the frigate. In an hour or two, twelve armed marines came from *La Concord*, boarded the schooner, weighed anchor and soon had her lying between the guns of the frigate and a French privateer. At midnight Antoine Charbonet Duplaine, the French Vice-Consul, came to the ship and told the Marshal the prize master should hold her, which he did for the space of three days. Then *La Concord* sailed away. The Marshal got assistance and drew the schooner to the wharf. For this offense Washington revoked the exequatur of Duplaine."

Such incidents were the logical outcome of attempts to use our ports as places of depot for the belligerents.

This was the beginning of the end and shortly thereafter Genet was recalled.

That the United States was not altogether free from blame in these controversies with France over neutrality is admitted by the Court of Claims in the famous case which so admirably sets forth the historic origin of the French Spoliation claims.

See Gray, *Admr. v. United States*, 21 Ct. of Claims, 340.

"Nor were we altogether clear of blame. We had not complied, so far as appears, with the stipulations of the treaties of 1778, intended to provide for possible war; we had not protected the West India Islands, and not only had we refrained from acting as the ally of France, but by the Jay Treaty we had given to her *enemy* the exclusive port privileges which she most valued and which were secured to her by the Treaty of Amity and Commerce" (p. 360).

. . . .

"Matters now again reached a halting point; neither side would yield; France acknowledged her real object to be to avoid payment of indemnity, while the United States on the other hand *could not assent to her views as to the guarantee and use of ports*" (p. 384).

*The claims of the United States rested upon international law. Those of France rested upon special treaty provision.* There were weighty arguments on both sides and after months of weary discussion, the parties finally agreed that France should renounce her treaty rights and the United States should renounce her claim to indemnity, and,

"so died the treaties of 1778 with all the obligations which they imposed, and with them passed from

the field of international contention the claim of American citizens for French spoliation" (p. 387).

The difficult situation in which the United States found itself by reason of its treaty stipulations as between France and Great Britain is well set forth by the Court of Claims (p. 356):

"We had promised France that their ships of war and privateers might freely carry whithersoever they pleased the ships and goods taken from their enemies; that these prizes should not be arrested, or seized, or examined, or searched in our ports, but might at any time freely leave, while no shelter or refuge was to be given to vessels having made prizes of her 'subjects, people or property.' (Art. 17, Treaty of Commerce, 1778.) *The United States had thus given France, and for consideration, not only a valuable, but an exclusive right; yet the Jay treaty, in the twenty-fifth article, gave these same privileges to Great Britain, including all vessels which 'should have made prize upon her subjects.'*

The conflict of the treaties is evident and of course was fully appreciated at the time.

. . . .

France was restive under the situation, and, shortly after the ratification of the treaty, asked whether the President had caused orders to be given to prevent the sale of prizes conducted into the ports of the United States by vessels of the Republic or privateers armed under its authority. As to this question the Secretary of State informed the President:

"That the twenty-fifth article of the British treaty having explicitly forbidden the arming of [French] privateers, and the selling of their prizes in the ports of the United States, the Secretary of the Treasury prepared, as a matter of

course, circular letters to the collectors to conform to the restriction contained in that [article of the British treaty] as the law of the land. This was the more necessary, as formerly the collectors were instructed to admit to an entry and sale the prizes brought into our ports by the French.'

The Secretary also wrote our minister in London that orders had been given to prevent the sale of prizes brought into United States ports by French privateers, 'conformably with the twenty-fifth article' of the Jay treaty. *So we had finally and openly transferred any exclusive rights of France under the treaty of commerce to her bitter enemy, Great Britain.*" (p. 358.)

These various difficulties and the origin of our neutrality laws are fully treated by Moore in his great work on International Arbitrations (Vol. IV, p. 3967).

The first act in the drama was Washington's proclamation of neutrality, proclaiming that "the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers." The difficulty in maintaining such neutrality was not only the condition of the country at the time and the division between the French and the English factions, but the undoubtedly difficult and embarrassing position in which the United States was involved by having accorded to France exclusive treaty privileges, and especially the provision allowing such use of its ports as was necessarily incompatible with impartiality to the belligerents.

Mr. Hammond, the British Minister, called to the attention of Mr. Jefferson, Secretary of State, the fact that British vessels captured by French frigates had been brought into Charleston and condemned as prizes by the French Consul, who was assuming to exercise the powers of a Court of Admiralty.



"Mr. Jefferson replied that the judicial act performed by the French Consul at Charleston was not warranted by the usage of nations nor by treaty, and consequently was a mere nullity, and that it involved a disrespect to the United States to which the government could not be inattentive." (p. 3970.)

A number of captures were made by privateers, fitted out and armed in the United States, and finally the *William* and the *Fanny* were brought to Philadelphia "and the interposition of the Courts was invoked to secure their restitution. Judge Peters of the District Court \* \* \* decided in June, 1793, that he had no jurisdiction in the matter, even though the capture was made within the territorial limits of the United States." (p. 3971.) He stated that "the whole of the case was novel in the United States."

This statement has a familiar sound, for the present case is claimed to be "novel" also. In principle, at least, it would appear to be almost coeval with the Republic.

The Court having thus refused to act, the President decided to act for himself, and the Secretary of the Treasury, Alexander Hamilton, on August 4, 1793, sent to the collectors of customs instructions providing among other things that:

"If any vessel of either of the powers at war with France should bring or send within your district a prize made of the subjects, people, or property of France, it is immediately to be notified to the governor of the State in order that measures may be taken, pursuant to the seventeenth article of our treaty with France, to oblige such vessel and her prize or such prize when sent in without the capturing vessel, to depart.

No privateer of any of the powers at war with France coming within a district of the United States can, by the twenty-second article of our

treaty with France, *enjoy any other privilege than that of purchasing such victuals as shall be necessary for her going to the next port of the prince or state from which she has her commission.* \* \* \*

If any such armed vessel shall appear within your district, she is immediately to be notified to the governor and attorney of the district, which is also to be done in respect to any prize that such armed vessel shall bring in or send in." (pp. 3971, 3972.)

Mr. Jefferson in his note to Mr. Hammond of September 5, 1793, states that prizes taken contrary to our neutrality must be restored and that this must be done not only in behalf of those nations with whom we have treaties but likewise with others. Restitution or compensation must be made to the nation whose vessel has been taken in violation of the rules of neutrality as known to the law of nations.

As to the shipping of arms and munitions of war, Mr. Jefferson said that the citizens of the United States were free to make, vend and export arms, subject to the penalty of confiscation, if such arms should be seized by any of the belligerents on the high seas. He also notified Mr. Hammond that where a vessel had been captured by one of the belligerents as in violation of the neutrality of the United States "persons should be appointed as representatives of the Governments concerned to ascertain the fact and decide what should be done."

Thus were the President and Secretary of State endeavoring by executive action to remedy the wrong done by the violation of American neutrality. Such act on the part of the executive was necessary because of the refusal of the lower courts to enforce the law. Doubtless this was not due, as Mr. McMaster apparently thinks, to corruption, but to sympathy with France and deference to public opinion, as well as to judicial hesitation when facing a new situation. It was

easier for the courts to pass the matter over to the executive department on the ground that it was a political question. The Supreme Court, however, did not shrink from the responsibility and, fortunately, the question early came before them. Professor Moore states the matter as follows:

"However, the Supreme Court rendered in the case of the sloop *Betsey* a decision that dissipated the doubts which had existed as to the jurisdiction of the courts of the United States to intervene in respect of prizes made by cruisers illegally fitted out and armed in the United States." (*Id.*, p. 3977.)

The *Betsey* was captured by *Le Citoyen Genet* and brought into Baltimore, where she was libeled for restitution in the District Court of the United States for the District of Maryland. The captor pleaded to the jurisdiction, setting up the French Treaty, and his plea was sustained. This was affirmed by the Circuit Court. The Supreme Court reversed the decree and remanded the case for final decision on the merits, holding that the District Court, being possessed of all the powers of a court of admiralty, instance as well as prize, was competent to decide whether restitution should be made, and that the admiralty jurisdiction which had been exercised by the French Consuls in the United States was unwarranted and "not of right."

The decree states:

"And the said Supreme Court being further clearly of opinion that the District Court of Maryland has jurisdiction competent to inquire and to decide whether in the present case restitution ought to be made to the claimants, or either of them, in whole or in part, that is whether such restitution can be made consistently with the law of nations and the treaties and the laws of the United States \* \* \*"

Apparently nothing further was heard of the question of jurisdiction in this class of cases after this decision.

On August 9th, 1794, the District Court in Charleston took jurisdiction in the case of the Brigantine *Vrow Christina Magdalena* (Bee. 11, Fed. Cas. No. 7216).

"The Judge on considering the arguments in support of the plea to the jurisdiction overruled the same as irrelevant, 1st, Because the 17th Article of the Treaty with France contemplates only French vessels of war or privateers legally appointed. 2nd, Because the 6th Section of the Act of Congress of the 5th of June last *does not lessen the jurisdiction of the District Courts in any case of which they had previous cognizance; and the decree of the Supreme Court of the United States in the case of Glass and others against the sloop Betsey having declared that every District Court of the United States possesses all the power of an admiralty court whether considered as an instance or prize court, this cause was therefore cognizable therein by the law of nations and the constitution of the court.*"

This decision in the case of the *Betsey* was most important. *At the time no statute on the subject existed* and the duties of the United States as a neutral nation depended upon the customary usages of nations, save where covered by special treaty. The case of the *Betsey*, therefore, not only overruled all the decisions of the lower courts refusing jurisdiction in this class of cases, but established at that early date (1794) the proposition that the courts of the United States had power to enforce and vindicate international law. This case was sufficient to establish the jurisdiction of the court in the present case to make restitution of the *Appam* upon the ground that she was illegally seeking asylum in a neutral American port, contrary to the law of

nations, as recognized by the Government of the United States. The French Treaty clause was in vain invoked as excluding the jurisdiction of the Court, precisely as the claimants here invoke the similar Prussian Treaty Clause. (See Appendix, pp. 108, 112.)

It is now impossible to contend in courts of the United States that rules of international law which by usage, custom or assent have become part of the law of the United States, may not be enforced by our courts. It is true that the courts of the United States do not, in the absence of statute, possess criminal jurisdiction; but the Constitution, in giving them admiralty and common law jurisdiction, has also clothed them with power to administer the law of nations, which is part of our own law. This was stated in the leading case of the *Paquete Habana* (175 U. S., pages 677-700), by Mr. Justice Gray with admirable lucidity, as follows:

"International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose where there is no treaty and no controlling executive or legislative act, or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, \* \* \* not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

The Court in that case cites with approval the case of *The Betsey*.

In the case of *The Scotia*, 14 Wall., 170, the Supreme Court said:

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obliga-



tion, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. \* \* \* And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. \* \* \* This is not giving to the statutes of any nation extra-territorial effect; it is not treating them as general maritime laws, but is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations."

In other words, the court, in order to ascertain the Law of Nations at any given time, may look to any reliable source of information in regard to the assent of the various nations to a particular rule. In this way the court in the present case looks to the German Prize Code as one source of information as to the use of neutral ports and finds that the German expression of the rule coincides with that of the Hague Convention.

The decision in the *Betsey* case was followed on June 5th, 1794, by the Neutrality Act, which, with some

additions, has remained the law up to the present time. This Act sought to meet the difficulties that had arisen out of the great European struggle and had for its object the declaration and codification of the policy followed by Washington and Jefferson and based by them upon the law of nations.

It thus appears that the Executive, the Supreme Court and the Legislature, each within the orbit of its proper functions, reached unanimous conclusions as to the law of neutrality. This statute did not, save in criminal cases, limit the jurisdiction of the courts to the precise acts covered by it. A statute of this kind may either cover all the international obligations of neutrality or only a part of them. Again, it may conceivably enforce, as part of the municipal law, various obligations which do not by the law of nations fall upon individual states. The statute itself makes it clear that it is not in its specific enactments as broad as the obligations which may be entailed by the law of nations, for in the eighth clause it is provided that it shall be lawful for the President of the United States, to compel "any foreign ship or vessel to depart the United States in all cases in which *by law of nations or the treaties of the United States they ought not to remain within the United States.*" (Moore, Int. Arb., p. 3980.)

The arbitral board constituted under Art. VII of the Jay Treaty (1794) construed the obligations arising towards Great Britain out of various seizures made by French war ships in violation of American neutrality. These cases were predicated either on the augmentation of armament or of crew, or the fitting out in American ports, or capture within the limits and jurisdiction of the United States. Even before the passage of the Neutrality Act, the Executive had determined that restitution must be made of such vessels, or where restitution was impossible, compensation by way of damages. In the case of *The Fanny*, the question of how far territorial jurisdiction extended was deter-

mined. Mr. Jefferson in his letter to Genet, June 5th, 1793, referring to the violations of American neutrality by equipment of privateers in American ports, says:

"On these considerations, Sir, the President thinks that the United States owe it to themselves and to the nations in their friendship, to expect this act of reparation on the part of vessels marked in their very equipment with offense to the laws of the land, *of which the law of nations makes an integral part.*" (*Id.* p. 4010.)

Referring to the proceedings that had been instituted against the captors in the District Court of Pennsylvania, and in which that court decided that it had no jurisdiction because of the obligation of the treaty with France, Mr. Jefferson wrote to Mr. Genet as follows:

"The intention of the letter of June 25th having been to permit such vessels to remain in the custody of the Consuls instead of that of a military guard (which in the case of the ship *William* appeared to have been disagreeable to you), the indulgence was of course to be understood as going only to cases where the Executive might take or keep possession with a military guard, *and not to interfere with the authority of the courts of justice in any case where in they should undertake to act.* My letter of June 29th, accordingly, in the same case of the ship *William*, informed you that no power in this country would take a vessel out of the custody of the courts and that it was only because they decided not to take cognizance of that case that it resolved to the Executive to interfere in it.

"Consequently this alone put it in their power to leave the vessel in the hands of the Consul. *The courts of justice exercise the sovereignty of this country in judicial matters, are supreme in these and liable neither to control nor opposition from any other branch of the Government.*" (*Id.* p. 4013.)

Mr. Jefferson further discusses the question whether the restitution of vessels so taken is a matter within the duty and competency of the Executive or of the judicial branch of the Government. He points to the fact that "one of the subordinate courts of admiralty has been of opinion in the first instance in the case of the ship *William*, that it does not belong to the judicial. Another perhaps may be of a contrary opinion. The question is still *sub judice*, and an appeal to the court of last resort will decide it finally." He proceeds to say that this is a mere "question of internal arrangement between the different departments of the Government depending upon the particular diction of the Constitution and laws, and it can in no wise concern a foreign nation, to which department these have delegated it" (*Id.* p. 4014).

It appears from the history of these controversies that executive restitution was made merely pending the decision of the question whether such restitution fell within the province of the executive or the judiciary. Subsequent to the decision of the Supreme Court in the *Betsey* case the restitution in such cases became a matter for the judiciary.

In other words, a function which, during a period of doubt had been exercised by the Executive, now by decision of the Supreme Court devolved upon the judiciary. To foreign nations it is a matter of little concern which Department should deal with the matter, but it is evident that our Department of State is acting in accordance with national traditions in leaving the question at bar to the judiciary.

The construction placed by the Executive upon the treaty clauses allowing prizes to be taken into American ports was set forth in Mr. Jefferson's letter to Gallatin, August 28th, 1801 (Moore's Digest of Int. Law, Vol. VII, Sec. 1302, pp. 935, 936):

"The doctrine as to the admission of prizes maintained by the Government from the commencement

of the war between England, France, etc., to this day has been this: the treaties give a right to *armed vessels with their prizes* to go where they please (consequently into our ports) and that these prizes shall not be detained, seized nor adjudicated, but that the armed vessel may depart as *speedily as may be with her prize to the place of her commission*; and we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty, no stipulation stood in the way of permitting France to sell her prizes here; and we did permit it, but expressly as a favor, not as a right. \* \* \* *These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold.*" (p. 936.)

and again Mr. Pickering, Secretary of State, in 1796 writes:

"The sale of prizes brought into the ports of the United States by armed vessels of the French Republic \* \* \* has been regarded by us not as a right to which the captors were entitled either by the law of nations or our treaty of amity and commerce with France." (p. 936.)

It is thus apparent that under the interpretation placed upon the clause of the French treaty, similar to that of the Prussian treaty, now in question, little more was granted to the vessel and her prize than would now be allowed under the law as declared by Art. 21 of the Hague Convention XIII. The vessel might come in with her prize where actual necessity required, but must go out again. It is idle to endeavor now to interpret the Prussian treaty by reference to the letters *inter sese* of the distinguished Americans who were engaged in the effort to persuade Prussia to make it. Whatever interpreta-



tion might have been put upon the language of the treaty as an original matter, it is now settled that it scarce did more than allow war vessels accompanied by their prizes to enter the harbor, where humanity required that they might seek temporary shelter, and then "as speedily as may be" to go out again "to the places named in the commissions" of the captor vessels. This very phrase of the treaty excludes the inference that the prizes might be commissioned to remain in American ports, as was attempted to be done in the case of the *Appam*.

The State Department is thus following early and settled Executive as well as Judicial authority in holding that the Prussian treaty clause, even were it here applicable, would not permit the vessel to remain in the port; nor is such treaty clause to be interpreted as permitting the vessel to go into the port at all for the purpose of seeking permanent asylum. The more the question is analyzed the more it will appear that these ancient treaty stipulations were narrowly construed by the United States in the maintenance of the policy of strict impartial neutrality. War vessels with or without prizes might have been absolutely excluded from our ports; by treaties with some nations we allowed them temporary shelter. We refused to consider this temporary shelter, as desired by the capturing belligerent, as an asylum, and the treaties, even where applicable, were thus interpreted in a fashion not inconsistent with fair neutrality.

It was said by Attorney General Wirt:

"It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports and put in a condition to be taken to the port of the captor for adjudication."

Assuming the Attorney General to have been correct as to the allowance for necessary repairs this, of course, could have no application to a vessel that sought one of our ports when it was very much nearer to its own, with the object of seeking *not temporary relief, but permanent asylum.*

Cushing, Attorney General (1855):

"A neutral nation while admitting belligerent men of war to its ports may, as it sees fit, wholly admit or wholly exclude their prizes."

7 Op., 212.

Clay, Secretary of State (1828):

"The laws of the United States do not admit of the sale within their jurisdiction, for any purpose, of prize goods taken by one belligerent from another and brought *into their ports.*"

\* \* \*

"Neither belligerent is allowed by the laws of the United States to sell his prize within their ports."

Moore's Digest, Vol. VII, p. 937.

Replying to the Peruvian Legation as to the course that the United States would pursue during the war between Spain and Peru, Mr. Seward said:

"This Government will observe the neutrality which is enjoined by its own Municipal Law and by the law of nations. *No armed vessels of either party will be allowed to bring their prizes into the ports of the United States.*"

Moore's Dig. Vol. VII, p. 938.

In treating of the question of asylum, Attorney General Cushing held that the admission of armed vessels of a belligerent, whether men of war or private armed

cruisers, with their prizes, into the territorial waters of a neutral for refuge, whether from chase or from the perils of the sea, is a question of mere *temporary* asylum accorded in obedience to the dictates of humanity and to be regulated by specific exigency (7 Op. 122).

Referring to the admission of French prizes Mr. Jefferson said that this right "is secured to her (France) exclusively of her enemies as is done for her in a like case by Great Britain, were her present war with us instead of Great Britain." The admission of public vessels, however, in case of stress of weather, etc., he says is not exclusive "as we are bound by treaty to receive the public armed vessels of France and are not bound to exclude those of her enemies" (Moore's Dig. Vol. VII, p. 983).

Much is attempted to be made of the attitude of the United States in regard to the so-called Bergen prizes referred to in Moore's Digest, Sec. 1314. These prizes were three British vessels captured in 1779 by the *Alliance* of Paul Jones' squadron, and taken into Bergen, where upon the demand of the British Minister they were seized by the Danish Government and restored to their owners, on the ground that as Denmark had not acknowledged the independence of the United States, the prize could not be considered as lawful. Claim was made by the United States against Denmark, and correspondence followed, but the claim appears to have been ultimately abandoned. Congress, as a matter of generosity, authorized the Treasury to make payment to the legal representatives of Jones, the officers, seamen, etc., of their fair proportion of the value of the prizes.

The history of this incident may be followed in detail in Wharton's Diplomatic Correspondence of the American Revolution (Volume 3, pages 385, 433-435, 528, 534, 540, 597, 678 and 744; Volume 5, page 462; Volume 6, pages 261, 717).

See also Act of Congress of March 28th, 1806, 6 U. S. Statutes, 61.

It fully appears from this correspondence, and espe-

cially from Benjamin Franklin's letter, printed in Volume 3, pages 433-435, that the general question of asylum for prizes was not discussed to any extent, and in any event was not the ground upon which Denmark acted. The prizes were brought into Bergen under stress of weather and for necessary repairs, and thus came within the purview of the rule now declared in the Hague Convention. The claim made by the United States might well be justified on this ground, but in any event it was not acceded to, no arbitration was had and no precedent was created except one *against* the right of asylum. The payment by the United States was an act of generosity, and not the declaration of a rule of law.

Appellants are clearly in error when they seek to eliminate from the discussion the actual cause of the resort to Bergen (Brief, p. 61). This appears from one of the quotations in their own brief (p. 63).

This brief *résumé* indicates the dangers incident to permitting neutral ports to be used as a base for belligerent operations. Pragmatically speaking, the rules formulated in Arts. 21 and 22 of the Hague Convention are not only sound, but constitute the only safe course for a neutral nation to adopt.

## POINT IV.

The Courts of Admiralty of a neutral country have jurisdiction of a suit by the owner of a prize which has been brought into a port of the neutral, and may award restitution when there has been a violation of neutrality on the part of the captor, whether inherent in the capture, or prior or subsequent thereto.

The appellants find themselves forced to admit as *beyond question* that "where a vessel claimed as a prize is lying in a neutral port, the courts of that country have jurisdiction concerning it" (Appellant's brief, p. 39), and may award restitution for a breach of neutrality by "an act in derogation of the sovereignty of the neutral country" (*Id.* p. 42). Appellants' arguments are, accordingly, directed not to the jurisdiction itself, but to its extent.

A brief review of the historical development of this jurisdiction is accordingly in order.

Many of the leading cases have already been referred to in the preceding sketch of the national conditions under which the rules on the subject first became established in American jurisprudence.

The general jurisdiction of the courts of admiralty of a neutral nation to award some measure of relief in cases of prizes brought into the ports of such nation, was recognized and established in England at a very early date.

One of the earliest decisions is the case of Samuel Pelagii, sometimes cited as Palachi's Case, reported in 1 Rolle, 175, and 3 Bulstrode, 27. The report in Bulstrode is more complete than that in Rolle. This case was decided in the thirteenth year of King James I (1616), when Coke was Lord Chief Justice. It appeared that Spain and Morocco were at war; that Pelagii, claiming to be commissioned as an ambassador by the King of Morocco, had captured certain Spanish ships and goods and had sold the goods to English merchants. The Spanish



Ambassador libelled the goods in the Court of Admiralty. Application was made to the Court of King's Bench, apparently by the English purchasers, for a writ of prohibition against the proceedings in the Court of Admiralty. In spite of the great jealousy that then existed between the courts of common law and the courts of admiralty, this application was denied. Authorities on the civil law were apparently consulted, and the Report says:

"Then as to the goods which were taken on the sea the civilians held that because he brought them in *solo amici*, notwithstanding the taking of these was not felony, yet they may there deal civilly for them in the Court of the Admiralty and he ought there to answer civilly, and therefore no prohibition was to be granted."

In the *Lex Mercatoria*, published in London in 1729, the general rule is laid down as follows, at page 179:

"If a ship having letters of marque or reprisal shall take the ships and goods of that nation against whom the same are awarded, and bring the same into a neuter port, the owners may there seize her or there the admiral may make restitution according to law as well of the ships and goods to the owners as the captives to their liberty; for that the same ought first to have been brought *infra praesidia* of that Prince or State by whose subjects they were taken."

The same principle is expressed in Molloy's *De Jure Maritimo*, Vol. 1, pp. 14, 15 and 58; also in the "Laws of the Admiralty," published in London in 1767, Vol. 1, p. 219. The two authorities last cited make a distinction between captures made by privateers and captures made by national men-of-war, but this is a distinction which has not been recognized in American jurisprudence, as will particularly appear from the opinion of Chief Justice Marshall, in the Circuit Court, in the case of the *Santissima Trinidad*, hereinafter quoted (pp. 57-61).

There are certain early decisions in the American Federal Courts which, as has already been indicated, were wholly swept away by the decision in the case of *The Betsey*, but which may be here referred to for the convenience of the court, viz.:

Moxon *v. The Fanny*, 2 Peters' Admiralty, 309; 17 Fed. Cas., No. 9895.

Findlay *v. The William*, 1 Peters' Admiralty, 12; 9 Fed. Cas., No. 4790.

Stannick *v. The Ship Friendship*, Bee's Admiralty Rep., p. 40; 22 Fed. Cas., No. 13291.

Moodie *v. The Ship Amity*, Bee's Admiralty Rep., p. 89; 17 Fed. Cas., No. 9741.

It may be noted that in the *Friendship* case the court refused restitution on the ground of the provisions of the French treaty, but said:

"By the law of nations, the bringing *infra praesidia* of a neutral nation might justify restitution in any case."

As already pointed out (*supra*, pp. 42, 43), the leading case, and the one which shaped the course of American jurisprudence on the subject, is *The Betsey* (3 Dall., 6.) This was a suit in admiralty for the restitution of a vessel captured by a foreign belligerent and brought into an American port. It was decided by the Supreme Court on the question of jurisdiction, and remitted to the District Court for determination on the merits. It appears from the transcript of record on file in the office of the Clerk of the United States Supreme Court, that the breach of neutrality alleged in the libel was the capture on June 21, 1793, within the territorial waters of the United States, to wit, "within two miles from Cape Henry, the southern promontory of the Chesapeake Bay," and after an American pilot had been taken aboard. The captor pleaded that the capture was made fifteen miles from the coast of the United States, and set up the provisions of the

French treaty as a bar to the jurisdiction, claiming that under that treaty prizes taken by the French "may come into and go out of the American ports at pleasure" (3 Dall. at p. 11), just as is claimed here. Upon appeal to the Circuit Court it was stipulated that the capture was made at the place alleged in the plea. This left as the issue of fact to be determined the question whether the ship and cargo were of neutral or enemy character. (See Extracts from Transcript of Record, Appendix, pp. 117-124, *infra*.)

The decision of this court determined that the court below had jurisdiction to try this issue of fact and to award restitution if it appeared that the ship or cargo was neutral, and that the treaty provisions were no bar to the exercise of this jurisdiction.

The libellants argued, with much force, in the *Betsey* case, and the Supreme Court evidently agreed with them, that:

"The act of bringing the vessel into an American port must be regarded as a voluntary election to give a jurisdiction which they [the captors] might otherwise have avoided."

That is exactly what the captors have done in the case at bar, and they have travelled twice the distance necessary to take the vessel into one of their own ports, for the purpose of doing so.

Another very important decision is the *Santissima Trinidad* (1 Brockenborough, 478; Fed. Cas. No. 2568; affirmed 7 Wheaton, 283). Chief Justice Marshall, sitting in the Circuit Court, discussed at length the questions whether restitution could be awarded by the court, as well as by the executive branch of the government, also whether such restitution could be awarded upon the claim of the private owner alone, and also whether any distinction was to be made between captures made by privateers and by national vessels. Upon these subjects he said:

"A question of much more difficulty remains to

be considered. By what department of the government is this restitution to be made? Without recapitulating much of what has been said at the bar, by stating the reasons on which my opinion is founded, I will acknowledge, that in my private judgment, this right and this duty devolve on the executive, or legislative, and not on the judicial department. The exercise must be regulated by a discretion, which courts do not possess, and may be controlled by reasons of state, which do not govern tribunals acting on principles of positive law. If, therefore, this was a case in which my own judgment was alone to be consulted, I should, I believe, confine myself to the inquiry, whether any act of Congress authorized the restitution sought by the libellants. But this court is not at liberty to decide for itself. It is bound, and ought to be bound, by the decisions of the Supreme Court, and its judgment must conform to those decisions. They are admitted to have settled the principle, that property captured by privateers, fitted out, armed, or manned, within the ports of the United States, and brought within the power of our courts, may be restored by them to the original owner. It is, however, contended that the same principle does not extend to captures made by national ships. That national ships are in many respects distinguishable from privateers, is not to be denied; is this case one in which a sound distinction can be taken between them? Ships of war and privateers, both cruise under a commission from their sovereign, and both make prizes under the authority of that commission. In both cases, the sovereign is the captor, and the prize vests absolutely in him. The cruiser, in both cases, is a mere instrument of war employed by his sovereign, and the particular interest which the agent may have in the thing acquired, depends on municipal regulations, of which this court can take no notice. The courts of the captor

will in both cases distribute the proceeds according to those municipal regulations, but foreign courts consider the property as the property of the sovereign, and the possession of the captor as the possession of the sovereign. In both cases, then, the foreign court which acts upon the prize, acts on property in the possession of a foreign sovereign, acquired by his authorized agent. In what then does the difference between the right of courts to interfere with their prizes consist?

We are told that the national ship of war, carries upon its deck a portion of the sovereignty of its prince, and is, of course, inviolable. I am not prepared to say that a privateer, commissioned for the purposes of war, is not equally inviolable, at least so far as respects its military operations. But I will not enter into this inquiry. I will ask, how is this inviolability acquired, and how far does it extend? In the case of *The Exchange*, 7 Cranch (11 U. S.), 116, the Supreme Court laid down the principle expressly, that this exemption from the jurisdiction of the nation, in which the national ship of a foreign sovereign is found, is derived, where there is no express compact, from the assent implied in the admission of such vessel into port. But the same case establishes this further principle; that this immunity is granted on condition that the sovereignty of the place be respected. A breach of the condition forfeits the immunity depending on it.

A national ship, openly and grossly violating the laws of a neutral government, enlisting a full crew, in opposition to those laws, forfeits the condition on which an exemption from those laws

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4. The *Grange* was a British ship, which had been cleared out from Philadelphia, in 1793, and was captured by the French frigate L'Ambuscade, within the capes of the Delaware, while on her way to the ocean (2 Marshall's Life of Washington [Rev. Ed.], 262).



was granted. On this principle the *Grange* was restored.<sup>4</sup> The government acts without being charged with a violation of faith. If the government acts, it acts by that department which is entrusted with the power of inquiring whether the belligerent has violated those neutral rights which forfeit his prize, and if the courts exercise this power rightfully, in the case of prizes made by privateers, they may, I think, exercise it in the case of prizes made by a national ship and brought within our territory. If there is a fallacy in this reasoning, I do not perceive it. But, supposing it to be applicable to a capture made within our waters, and immediately arrested, it is contended, that it is inapplicable to a capture made on the high seas, and brought within our waters. The violation of neutrality gives, it is said, a claim on the sovereign, whose power is an unit, and cannot give rights to seize prizes made by one vessel more than by another. When the offending vessel comes again into port, she comes in with all the immunities originally attached to her. In theory, this argument is strong; but, practically, it would destroy the efficacy of the principle. It would deprive the neutral government of its power to give specific relief; and seems to me to be as applicable to prizes made by privateers as by national ships.

Another idea was suggested by the counsel for the claimants, of which I feel the full force. It is, that this application to the neutral sovereign to vindicate his neutral rights, and repair the wrongs done to a foreign sovereign, must be made by that foreign sovereign himself, through his authorized agent, and not by a private individual. Were I to admit this, the question immediately occurs—Does not this objection go as strongly to the restoration of prizes made by privateers, as to the restoration of prizes made by national ships? I am not sure that I am master of that train of

reasoning which has conducted the Supreme Court, to the assertion of that jurisdiction over prizes made by privateers, which has been exercised. If I were, I should not attempt to give it, because it will be stated more ably by those who are themselves convinced of its propriety. I content myself with saying that I think the principles on which prizes made by privateers have been restored, apply to prizes made by national ships, who have violated the neutrality of the United States, and I, therefore, hold myself bound to restore in this case. The sentence of the district court is affirmed."

Chief Justice Marshall's decision was affirmed in all respects by the Supreme Court, and the following further principles were also laid down:

1. That "whatever may be the exemption of the public ship herself and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and inquiry, and, if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality."

2. "That where a property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can by its adjudication rightfully take away its jurisdiction or forestall and defeat its judgment."

(See 7 Wheaton, at pages 354 and 355.)

The case of *The Exchange* (7 Cranch. 116), where a prize which had been converted into a public armed vessel was held exempt from the jurisdiction of our courts, was distinguished on this ground, and it was held that a condemnation as prize pronounced in the courts of the captor's country after the institu-

tion of suit in the American courts did not operate to oust the American jurisdiction.

Other cases which illustrate the general rule are:

*L'Invincible*, 1 Wheaton, 238.

Here the Court said, at page 258:

"That the mere fact of seizure as prize does not of itself oust the neutral admiralty court of its jurisdiction is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession, to wit, those in which her own right to stand neutral is invaded."

*The Divina Pastora*, 4 Wheaton, 52:

"But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

*The Estrella*, 4 Wheaton, 298:

"It is true they (the Statutes) recognize a right in the courts of the United States to make restitution, when these laws have been disregarded, and impart to the courts a power to punish those who are concerned in such violations. *But in the absence of every act of Congress in relation to this matter the court would feel no difficulty in pronouncing the conduct here complained of an abuse of the neutrality of the United States; and although in such case the offender could not be punished the former owner would nevertheless be entitled to restitution.* Nor is our opinion confined to the single act of an illegal enlistment of men, which is the only fact proved in this case, for we have no hesitation in saying that for any of the other violations of our neutrality alleged in the libel if they had been proved the Spanish owner would have been equally entitled to restitution.

*La Amistad de Rues*, 5 Wheaton, 385:

"Whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations, and the doctrine is fully recognized by the Act of Congress of 1794."

See also:

The Brig *Alerta*, 9 Cranch., 359.

*La Concepcion*, 6 Wheaton, 235.

The *Monte Allegre*, 7 Wheaton, 520.

The *Santa Maria*, 7 Wheaton, 490.

The *Arrogante Barcelones*, 7 Wheaton, 496.

In this last case restitution was awarded as against the original unlawful captor, although the prize had been condemned by a prize-court and had come back to the possession of the original captor by mesne conveyances. The court held that such an adjudication might protect a *bona fide* purchaser, but would not enure to the benefit of the offender.

Also:

*Talbot v. Jansen*, 3 Dall., 133; Fed. Cas., No. 7216.

*Fay v. Montgomery*, Fed. Cas., No. 4709.

*Cushing v. United States*, 22 Court of Claims, 1.

*Consul of Spain v. Consul of Great Britain*,

Bee's Admiralty Rep., 263, 6 Fed. Cas., No. 3138 (1808).

In this last case the court granted an injunction to stop the sale of a Spanish vessel captured by a British man-of-war and brought into an American port, and held that such a sale should not be held without the express permission of the United States, as it was inconsistent with the sovereignty of the United States.

There is a very striking case, decided by the Admiralty Court at Halifax in 1864: *The Queen v. The Chesapeake* and cargo (1 Oldright's Nova Scotia Reports, page 797). In this case an American vessel sailing from New York was captured by some Confederates who had shipped thereon as passengers, some of them holding naval commissions from the Confederate States. They overpowered the captain and crew, and took the vessel into a Canadian port. A suit was instituted in the name of the Crown for the forfeiture of the vessel for violation of British neutrality. Claim was made on behalf of the private owners, and restitution to them was ordered, on payment of costs and expenses. The case is discussed at some length in Moore's Digest of International Law, Volume 1, page 366, and Volume 7, page 937.

In the course of his opinion on the final hearing, the Judge of the Vice-Admiralty Court said:

"By the affidavits upon which I granted a warrant it is certain that the *Chesapeake*, if a prize at all, is an uncondemned prize. For a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it *ipso facto* subjects that prize to forfeiture. *For a neutral state to afford such protection would be an act justly offensive to the other belligerent state.*"

At a prior hearing on Jan. 13, 1864, the Court had stated:

"Captures lawfully made by a belligerent may by subsequent misconduct of the captors in respect to such capture, so divest themselves of their vested rights as to take from them the aid of the Court of Admiralty.

• • • • •

"More than sixty years ago Sir Alexander Croke decided, not on a statutory provision but on the



common law of admiralty, in the case of *La Reine des Anges*, that the right of a captor to a prize which had vested in him was, by his subsequent conduct in respect to the captured vessel, wholly divested, and he condemned her as forfeited to the Crown *jure coronae*."

The case of *La Reine des Anges* above cited is reported in Stewart's Admiralty Reports (Nova Scotia), at page 11. It was decided in 1803. In that case the prize was declared forfeited to the Crown on account of the captor's failure to comply with the established prize regulations. The breach of the regulations was a sale of the prize before condemnation.

There are a number of cases, both in England and this country, which hold that in condemnation proceedings in the prize courts of the captor's country the private owners cannot successfully set up as a defence the violation of another nation's neutrality, but that such a claim can be set up only by the neutral sovereign.

Here, of course, it is the neutrality declared by the *lex fori* that has been violated and no such question arises. The United States Neutrality Act, moreover, expressly gives jurisdiction to the District Courts in the event of territorial violations, as shown above.

See, as illustrating the general rule,

*The Purissima Concepcion*, 6 Rob., 45.

*The Vrow Anna Catharine*, 5 Rob., 15.

*The Eliza Ann*, 1 Dods., 244.

*The Diligentia*, 1 Dods., 404.

*The Twee Gebroeders*, 3 Rob., 161.

In the case last cited claim was made by the neutral nation and restitution was ordered. The actual capture was made outside of neutral territory by boats sent out from a belligerent ship which was itself in neutral waters: Sir William Scott said:

"I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say *remote* uses, such as procuring provisions and refreshments and acts of that nature which the Law of Nations universally tolerates, but that no proximate acts of war are in any way whatever to be allowed to originate on neutral grounds."

See also :

The *Anna*, 5 Rob., 373 (1805).

In this case a British privateer had captured an American vessel in American waters near the mouth of the Mississippi. The captors claimed that the ship was Spanish. The American diplomatic representative intervened in the English Prize Court and restitution was ordered on account of the violation of American neutrality.

See also

The *Sir William Peel*, 5 Wall., 517.

The *Florida*, 101 U. S., 37.

It is thus clearly established by the authorities that where the captor of a prize has violated American neutrality by illegally equipping his vessel, or augmenting his force, in the United States, or by making the capture in American waters, and thereafter brings the prize into an American port, its restitution will be ordered; in other words, that he will lose his right to the prize by violation of our neutrality prior to or in the act of capture. In the case at bar the violation of neutrality was subsequent to the act of capture and was a deliberate attempt to use an American port as a naval base for the safe-keeping of the prize during the war. The time of the violation of neutrality is immaterial; there has been a violation and the prize has been voluntarily brought within the jurisdiction of the American courts. The

power and duty to make restitution follow as a matter of course.

There are special statutory provisions, both in England and in this country for judicial restitution in certain specific cases of violated neutrality.

In Great Britain the Foreign Jurisdiction Act of 1870, in the case of a prize taken where British neutrality has been violated, provides that:

"Sec. 14. If during the continuance of any war in which Her Majesty may be neutral any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, \* \* \* it shall be lawful for the original owner of such prize, or his agent, or for any person authorized in that behalf by the Government of the foreign state to which said owner belongs, to make application to a court of Admiralty for seizure and detention of such prize, and the Court shall, upon due proof of the fact, order such prize to be restored."

Westlake, *Int. Law*, Part II, pp. 229, 230.

The District Courts of the United States also have the same power, for it is provided by the Act of 1818, which is still in force, that

"The District Courts shall take cognizance of all complaints, by whomsoever instituted, in case of captures made within the waters of the United States or within a marine league of the coasts or shores thereof. In every case in which a vessel is fitted out and armed \* \* \*; and in every case of the capture of a vessel within the jurisdiction or protection of the United States, as above defined; and in every case in which any process issuing out of any court of the United States is disobeyed \* \* \* it shall be lawful for the President \* \* \* to employ

such part of the land or naval forces \* \* \* in order to the execution of the prohibitions and penalties of this Title and to the restoring of such prize in the cases in which *restoration shall be adjudged.*"

See also Sec. 5287, U. S. Rev. Stat.

It is further provided in Sec. 5288 that the armed forces of the United States may be used to compel the departure of such a vessel. The authority of the President to employ such armed forces

"will be dependent upon the resistance to the process of the courts of the United States."

4 Op. Atty. Gen., 336, 338 (1844).

These statutory provisions, however, do not limit the admiralty jurisdiction of the Courts to these particular instances, they merely declare it.

The appellants claim that since there is no specific statute or express decision of our courts awarding restitution for the precise violation of neutrality here complained of, the court had no power to grant such relief in this case. If there were such a statute or a decision of this court exactly on all fours with the case at bar, all this argument would be superfluous.

This case, however, as decided by the court below, does not make new law. It is merely the application of established rules of international law to a particular set of facts not heretofore expressly adjudicated upon by our courts.

The general rule is that a prize brought into the port of a neutral nation may be restored for a violation of that nation's neutrality. The former cases deal with violations of neutrality by capture in neutral waters, or by illegal equipment of the vessel, or augmentation of the crew, but there is none in which it has been held that restitution could *not* be awarded for a violation of neutrality subsequent to the capture, and in the Chesapeake case restitution *was* awarded on this ground.

This is not a case of statutory construction where, it may be, *expressio unius exclusio est alterius*. It is a case where a general rule should receive, and has received in the court below, that developed application which is the principal source of formulated international or common law.

Our statutory law of neutrality is not exclusive or all embracing, and our rights and duties of neutrality under international law are not to be evaded or avoided by the invention of novel breaches of neutrality, not foreseen, and hence not expressly provided against by statute. This principle is admirably stated in the official Case of the United States Government before the Geneva Arbitration Tribunal, as follows:

"The obligation of a neutral state to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation, but it can neither 'create nor destroy it, for it is an obligation resulting directly from international law which forbids the use of neutral territory for hostile purposes.' " (Papers relating to the Treaty of Washington, Vol. 1, p. 47.)

*It is in principle as much a violation of neutrality for a prize to come into our ports to avoid recapture as it is for a war vessel to come into our waters to make a capture.*

The appellants cite no case (for the very good reason that there is none) in which it has been held by our courts, either under general international law or special treaty, that any belligerent ever had a right to send a prize into one of our ports, "there to lay up," safe from recapture for the remainder of the war and immune from the jurisdiction of any department of our government.

In *Hudson v. Guestier*, 4 Cranch, 293, cited by appellants at p. 37 of their brief, the crucial point was that there



had been a seizure in French territorial waters for violation of French municipal law. The court held that jurisdiction was thus lawfully acquired, and was not lost by the subsequent departure of the seized vessel and her escape to neutral waters. This is manifest from the decision in *Rose v. Himely*, which was argued at the same time with *Hudson v. Guestier*. There it appeared that the seizure was made outside of the territorial jurisdiction of the French Government for violation of a municipal regulation, and this court held that since the vessel had never been within French jurisdiction, the sale by the captor in a foreign port, and the subsequent condemnation by a French court, were without jurisdiction, and void. (See 4 Cranch, 241, 292).

In *Jecker v. Montgomery* (13 How. 498), cited by appellants at p. 38 of their brief, the sale under consideration was made at Monterey, then in the actual possession of the American military forces. The proceeds at the time of the litigation were in the United States Treasury, and the condemnation was for a violation of the municipal law of the United States in trading with the enemy. (See also second report in 18 How. 111).

In *Williams v. Armroyd* (7 Cranch, 423), cited by appellants at p. 53 of their brief, there was no question of any violation of neutrality. Moreover, there had been an actual sentence of condemnation by a French court having jurisdiction of the proceeds of the sale, and this was held to have been good *in rem*.

The general principles for which we contend are unchallenged and unshaken by any of the decisions cited by appellants.

## POINT V.

The Prussian Treaties of 1799 and 1828 did not make it lawful for the German prize master and crew of the "Ap-pam" to bring her into an American port to lay up, or to keep her here indefinitely.

The text of the relevant portions of the treaties is printed as an appendix to this brief, together with the text of the substantially contemporary treaties with Sweden, France and England. All of these treaties, except that with England, were in French, the language then chiefly employed in diplomatic documents. The original French text and the English translation (as published in 8 U. S. Stat.) are given in parallel columns. It is manifest from an examination of these texts that all of these treaties apply only to prizes which are brought into American ports by vessels of war, and do not apply to prizes arriving without convoy and merely under the command of prize masters. The treaty privileges are granted not to the prizes or their commanders, but to the vessels of war of the parties to the treaty, and such vessels are permitted to carry in their prizes and to carry them out again to the places expressed in the commissions of the capturing vessels, which commissions the officers of such capturing vessels are required to show.

They constitute exceptions and necessitate strict construction. The mere fact that the war vessel brought in the spoil of war did not release that spoil. The vessel could carry it out again. That is their extent.

The treaties contemplate merely a temporary stay for some particular necessity and do not permit a neutral port of refuge to be made a port of ultimate destination or of indefinite asylum. They were intended merely to extend the exemption of a public war vessel from the territorial jurisdiction of the United States, so as to include the prizes made by such public war vessel and still under her immediate convoy.

The opinion of the Secretary of State of March 2,

1916 (see Rec., pp. 17-19) in regard to the interpretation of the treaty is manifestly correct, besides being entitled to great respect as the construction of the treaty placed upon it by that branch of the Government primarily charged with its enforcement.

The original French text of the Prussian treaty of 1799 is free from the ambiguity that appellants impute to the English translation. It distinguishes clearly between "*vaisseaux de guerre*" (vessels of war) and "*prises*" (prizes), and this distinction is carried out through the whole article. The "*vaisseaux de guerre*" may bring ("*conduire*," from *con-duco*—to lead with) the "*vaisseaux pris*" into American ports, and these "*prises*" may go out and be carried (*conduites*) by the captor vessel (*le vaisseau capteur*) to the places named in the commissions which the officer commanding the said vessel (*le dit vaisseau*), i. e., the captor vessel, shall be obliged to show.

The linguistic learning and elaborate etymological exegesis lavished by the appellants upon the word "carry" and its Eighteenth Century usage are quite beside the mark, in view of the plain grammatical construction of the original French text of the treaty.

Appellants' historical review of the negotiations for the treaty actually militates against their own contentions. It demonstrates the three following points:

(1) That the American representatives were trying to get more than they finally got or reciprocally agreed to in return.

(2) That what the American representatives chiefly sought and actually did obtain was a right of access to Prussian ports for war vessels with prizes, instead of the complete exclusion which they feared. They got and gave a right to enter and depart under convoy, but not a right to indefinite asylum, to sequestration or to make sales.

(3) That the convoy of a war vessel to protect its prizes was insisted upon as essential because, as the

Prussian Sovereign pointed out, some of his principal ports were not fortified, and he therefore could not protect a prize which came in for shelter without a war vessel to defend it against hostile attack. (See Appellants' brief, page 87.)

The Prussian treaty was never intended to give to either party the right to use the ports of the other as a place of depot for prizes or other spoil of war. The tendency of the time was to prohibit generally the entry of both ships of war and of prizes and to permit it at all only to those nations favored by special treaty. The right secured by such special treaties was merely the right of entry for temporary purposes—the right to enter and depart, instead of being altogether excluded—not the right to sequester during the war or pending condemnation.

By its express terms the Prussian treaty has no application to prizes navigating independently. The *Appam*, therefore, is not entitled to any special privileges under the treaty, but only to those privileges afforded by the law of nations generally to prizes of war, namely, to enter neutral ports only in case of unseaworthiness, stress of weather or want of fuel or provisions, and to leave as soon as the special cause of entry has been removed.

As the German prize master brought in the *Appam* not for any of the causes or purposes recognized by the law of nations but for the express and declared purpose of laying her up in an American port, she is entitled to no privileges, either under the treaty or under the general law of nations.

It is immaterial that the State Department did not announce its decision as to the applicability of the treaty immediately upon the receipt of the German ambassador's communication. If the treaty as properly construed does not apply, it cannot be given a provisional application by any delay of the executive authorities in considering the question, nor can such delay suspend

the operation of the general rules of international law, which, in our jurisprudence, are regarded as constituting a part of our own municipal law. The doctrine of suspension of law by executive action died with Charles I; the doctrine of suspension of law by executive inaction is novel and should be still-born.

The situation presented is analogous to a question of the constitutionality of a statute. It either is or is not constitutional from the beginning, irrespective of the length of time it may take the courts to determine the question, and no one can acquire indefeasible rights in reliance upon it merely because its unconstitutionality has not been expressly adjudicated.

The note of the Secretary of State of April 4, 1916, upon which appellants lay so much stress, is not in any way determinative of the questions involved in this case. It does not appear that the State Department at that time was cognizant of the fact that the German prize crew of the *Appam* was insufficient to take her out again and navigate her safely, and that therefore any executive order requiring her to depart could not have been complied with and would have been a mere idle formality. At most, the Secretary stated that in his opinion "the *presence* of the *Appam* in American waters under the circumstances" did not constitute a violation of neutrality. This is strictly true. The *Appam* was then held under process of the United States court, and her mere *presence* in American waters was, therefore, legitimate. The note did not deal in any way with the effect of the treaty on the *Appam's* entry.

It was not her mere presence in American waters, but her attempted use of them, not for temporary refuge but for permanent safe keeping, which constituted the violation of neutrality.

This note of April 4, 1916, only shows the desire of the State Department to preserve the *status quo* during the litigation and to leave the decision of the questions involved wholly to the court, without representations by



the State Department on either side of the controversy. This is further shown by the whole diplomatic correspondence on the subject.

The appellants' claim that the *Appam* came into our port in response to what they believed was an express permission, if not an invitation, and that therefore she was not a trespasser, at least until after notice to depart, since a guest is not a trespasser. But one cannot come under the guise of a guest and at the same time announce an intention to remain indefinitely. An invitation or permission to call does not confer the right to pitch one's tent and stay. Before the appellants had answered the amended or even the original libel, the State Department had announced its conclusions, and the Appellants then knew officially that they were trespassers (see Rec. pp. 2, 8, 17). According to a familiar rule of equity, very appropriate to be applied in admiralty, "it is the rights of the parties, at the time the decree is rendered, that ought to govern the Court in rendering the decree" (*Randel vs. Brown*, 2 How., 406, 423). The appellants do not claim that the *Appam* would have departed after the announcement of the State Department's views, if she had not been held under legal process. They cannot make such a claim, because they expressly admit that the prize crew is "insufficient of itself to operate the ship" (Appellants' Brief p. 22).

The construction which the appellants now seek to put upon the Prussian treaty would be incompatible with this Government's neutrality toward the other belligerent powers. It would make the United States render an unneutral service to Germany by removing the disadvantage she suffers from England's superior sea power and by giving special privileges to Germany not enjoyed by the other belligerents.

In analogy to the principle that a statute is to be so construed, if possible, as to sustain its constitutionality, a treaty with any particular nation should be so construed, if its terms permit, as to make it consistent with

the obligations of the contracting parties toward other nations, whether by specific treaty or general international law. The interpretation of the treaty by the State Department and by the court below is consistent with the general law of nations, as shown by the provisions of Hague Convention XIII and by the general usage of the Powers. It is also the obvious and natural meaning of the language of the treaty. Any other construction would be equally violative of grammar and of international law.

The contention of the appellants that the commander of the *Möwe* sent the *Appam* here, relying in good faith on the privilege of asylum, which he claims was guaranteed by the treaty, and to avoid the unnecessary destruction of valuable property by sinking the vessel after her capture, is wholly inconsistent with the facts, which show that the actual motives and purposes of the German captors were wholly otherwise.

It is clear that an important purpose of sending the *Appam* to Newport News was to aid the *Möwe* in her raiding operations by keeping her activities secret as long as possible and that a further purpose was to use the *Appam* as a prison ship for the confinement of British subjects in American territory. Both of these purposes involved deliberate violations of this country's neutrality. This has already been pointed out in the statement of facts, but a further reference to it at this point is proper.

In January, 1916, the *Möwe* was operating as a commerce destroyer off the west coast of Africa. Prior to January 15th she had captured and sunk six or seven vessels and taken their crews on board as prisoners, to the number of 150 (Rec., page 26). The total crew of the *Appam* was 160 and her passenger list about 170.

When the commander of the *Möwe* captured the *Appam*, he was confronted with the problem of what to do with the prisoners, now aggregating nearly 500. The *Möwe* herself obviously could not accommodate them.

Further prisoners aboard would handicap her efficiency as a commerce raider, and to furnish subsistence for them would necessarily curtail her period of activity. She was within 150 miles of the Madeira Islands, and also, as will appear from any map of the region, not far from the Canaries, the latter belonging to Spain, then and still a neutral power. The prisoners might have been landed there in a day or two, but this fact would have at once become public and brought British cruisers speedily upon the scene.

For the *Möwe* to continue her operations successfully, it was imperative to find some way of disposing of these prisoners which could not come to the knowledge of the British Admiralty for a considerable period of time. The *Appam* had not resisted or attempted to escape, and there was thus no color of excuse for adopting the simple but barbarous expedient of sinking her with all on board. The ingenious plan was accordingly devised of putting the prisoners from all the captured vessels on board the *Appam* and sending her to the most remote neutral port to which her coal supply could take her at a slow rate of speed. By sending the *Appam* to Hampton Roads on an unfrequented route, the news of the *Möwe's* exploits was suppressed for more than two weeks. During this time the *Möwe* continued her career as a commerce raider and eventually returned to her home port.

It appears that after the *Appam* was captured, careful inquiry was made as to her coal supply and "the consumption for different speeds" (See Rec., page 36). These inquiries were repeated by Berg when he took charge. (Rec., page 37.) At the time of capture the *Appam* had 560 tons of coal aboard, and her average consumption per day was 65 tons at full speed. (Rec., page 36.) She proceeded to Hampton Roads under slow speed, consuming about 30 tons a day, and arrived with only 60 tons left. (See Rec., page 41.) She traveled in fourteen days approximately 3,000 miles at the rate

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of about nine knots an hour. It is evident that her voyage was so planned as to keep the facts a secret for the longest possible time. She had to come to port some time. She could not, like the Flying Dutchman, cruise the seas forever. The selection of one of our ports was manifestly for the purpose of directly aiding German belligerent operations in the manner set forth.

The attempt to establish a German military prison in our waters was equally violative of our neutrality and even more amazing in its effrontery.

When the *Appam* arrived at Hampton Roads, she had on board more than 400 British subjects who had been held as prisoners under an armed guard during the trip across the Atlantic, and who were confined below decks on the night of arrival. (Rec., page 41.) An attempt appears to have been made to disguise or conceal this fact by removing the arms and the distinguishing badges of the guards upon arrival. The *Appam* arrived at Hampton Roads on February 1st, but the prisoners were not immediately released. On February 2nd the German Ambassador communicated with the Secretary of State, informing him of Berg's intention to remain in American waters until further notice, and requested "internment in the United States during the remainder of the war of a military party belonging . . . to the enemy of Germany, and also the internment of the crew of the *Appam*, inasmuch as they offered resistance to capture by His Majesty's forces." (Rec., page 17.)

As the evidence shows, and as appellant's brief emphasizes, there was no resistance whatever, and this last representation was manifestly false. The Commander of the *Möwe*, and Berg, must have known that the prisoners would be released, as they were in the case of the *Farn* (*infra*).

Further details are given in the published Diplomatic Correspondence:

In the Note of the German Ambassador of February 2, 1916, it is said:

"She (the *Appam*) carries on board the crews of seven enemy vessels taken by H. M. S. *Moewe*, who have been transferred to her by that ship.

There is on board a locked-up military party of the enemy, whose internment in the United States I request."

(State Dept., Dipl. Corr. European War No. 3, p. 331.)

In the note of the Secretary of State to the British Ambassador, of February 3, 1916, he transmits a list

"of persons on board the *Appam* which the prize master asserts are in the military or naval services of His Britannic Majesty and whom he believes, therefore, should not be released from his vessel."

(*Id.*, p. 331.)

In the Memorandum from the German Embassy received by the State Department, February 8, 1916, this claim was made:

"Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to the English.'"

(*Id.*, p. 333.)

It appears from this correspondence that the German diplomatic representatives expressly claimed that the captors were entitled to "lay up" the *Appam*; that she was not subject to be interned; that both the vessel and her crew should be wholly free from any control or supervision by this Government, and that prisoners brought in on the vessel should be detained in captivity in American waters at the pleasure of the captors.

The officers, crew and passengers of the *Appam* were not released and did not leave the vessel until February 3rd. (See Rec., pages 27-28.) Their release was evidently effected pursuant to orders from the United States Gov-



ernment, as stated in Secretary Lansing's note of March 2nd, 1916, (Rec., page 19). It is thus the undisputed and indisputable fact that Berg brought into an American port more than 400 British subjects held as prisoners of war; that he kept them all in actual confinement there for a period of two days with the purpose and intention of making such confinement permanent as to some of them during the period of the war, and that he did this, not by mistake or inadvertence, but under a claim of right. A more egregious disregard of neutrality could hardly be imagined. Fortunately, the nation has been spared the spectacle of a German prison ship confining civilian British prisoners, lying at anchor under the guns of Fort Monroe, and thus protected against rescue by British cruisers.

The *Appam* was expressly claimed as a *prize*, and the German Ambassador certified that she had "not been converted into an auxiliary cruiser." (State Dept., Dipl. Corr. European War, No. 3, pp. 331, 333.) It accordingly cannot now be claimed that she was entitled to be treated as a "fleet auxiliary," similar to the *Farn* (*infra*) because she had prisoners aboard. She was not taking the prisoners to any place where she had a right to take them, or otherwise rendering any legitimate belligerent service against the enemies of Germany. She was operating solely against our neutrality.

It is quite immaterial that there was no notice to depart given by the United States Government. Such a notice might perhaps be necessary if the *Appam* had come in for temporary refuge under the circumstances recognized by international law as justifying such an entry. She did not do this. She came in to stay. There was a manifest intention to violate our neutrality from the time she headed westward. The whole proceeding was, as described by the court below, "one continuous occurrence." The violation was complete as soon as she entered our territorial waters. She thereby escaped

recapture by British cruisers, but she came under the operation of American law by her own free act. She has no rights whatever under the Prussian treaty and she comes within the purview of that rule of international law declared in article 22 of the Hague Convention. She must accordingly be released as a prize brought into a neutral port under circumstances other than those recognized as justifying such entry.

#### POINT VI.

Complete title to a prize, whether neutral or belligerent, does not fully vest in the captor until the prize has been brought into one of the captor's ports and duly condemned by a competent Prize Court of the captor's country. Until such condemnation the prize may be lost by recapture, abandonment or violation of another nation's neutrality. The captor thereby loses whatever title he may have had.

There has been much discussion in regard to the time when title to a prize becomes fully vested in the captor. In the case of neutral prizes seized for breach of blockade or other sufficient reason, it has been uniformly held that condemnation by a prize court having jurisdiction is necessary, since the facts upon which the right of seizure depends cannot otherwise be officially established. As between belligerents, however, it has sometimes been claimed that title passed by the mere fact of capture; sometimes that "pernoctation," or twenty-four hours' firm possession, was requisite; sometimes, that bringing the prize into a place of safety or *infra praesidia* was necessary; and sometimes, that condemnation by a proper court having jurisdiction was essential. The rule last mentioned is the most modern and the best sustained by authority.

Title by capture rests purely on force, and is ob-

tained only by the successful exercise of an act of war. To constitute complete success in this respect, the prize must be brought into a place where abandonment or recapture becomes substantially impossible, and incorporated into the general mass of property of the captor's country. Such incorporation can only be officially declared by a proper sentence of condemnation.

Prior to such condemnation the captor has merely a right *ad rem* and no right *in re*; in other words, merely that limited right which possession gives until by condemnation *dominium* or plenary title is acquired (Amos, Roman Civil Law, p. 157). The origin of the recognition and protection of mere possessory rights in movables is "found in the general policy of recognizing rights while being actually exercised, so as to prevent violence and extra-judicial conflicts during the interval when the judgment of a court of law is being waited for" (*Id.* p. 158).

It is sometimes argued that the captor may sink a belligerent prize instead of taking her in for adjudication; that he does so by virtue of the ownership he has acquired in making the capture, and is thus simply destroying his own property, which he has a right to do; and from this right of destruction it is sought to infer the right of property on which it is claimed to be based. This reasoning is fallacious, and is an attempt to deduce a single cause from an effect which may be and is due to another cause. The proper view is, that the destruction of a belligerent prize is simply the completely successful exercise of an act of war which may be regarded by the law of nations as legitimate. Doubtless the time will come, in the development of international law and the growing respect for private property, when the destruction of prizes will be given up by the common consent of civilized nations. As matters stand at the present time, rights of property cannot be based upon the mere continued toleration of an abuse of belligerent powers.

There is considerable diversity among the early authorities on this question, much of which is seen to be only apparent if we keep in mind the distinction between a *full property right (dominium)* and that limited right to the thing possessed that is acquired with possession.

Grotius said in Liber 3, Chapter 6, section 3, note 3:

"Things are considered as captured when they are brought within the boundaries, or *intra praesidia*, under the protection of the enemy."

\* \* \*

"Whence it seems to follow that at sea, ships and other things captured are understood to be captured when, and not till, they are brought into dock or harbour, or to the place where the fleet is; for then recovery becomes desperate. But we find that it has been established by the more recent law of nations among Europeans that such things are understood to be captured when they have been twenty-four hours in the possession of the enemy."

In *Bynkershoek's Treatise on the Law of War*, Du Ponceau's Translation, Chap. 5, p. 41, this view was expressed:

"What the enemy has taken on the high seas, at a great distance from his territory, he may lose and often loses by recapture. If he carries what he has taken into his own ports and territory, no one can doubt that it has then become his absolute property. I would say the same if he carried it into the port of a neutral or of an ally, but, if this, as I said before, cannot be admitted, I must grant that whatever is taken at sea, is to be carried into the captor's own port or fleet, and that it cannot be until then considered as fully his."

In *Burlamaqui, Principles of Politic Law*, Part 4, Chap. 7, sections 15-18, the author concludes, after discussing the subject at length, that the test of the pass-

ing of title to prizes is the loss of the hope of recovery, but says:

"I see no reason why the prizes taken from the enemy should not become our property so soon as they are taken."

*Richard Lee*, in his *Treatise of Captures in War*, expresses both views. He says at p. 82:

"Prizes taken from the enemy certainly become the property of the captors so soon as taken, for when two nations are at war, both of them have all the Requisites for the Acquisition of Property at the very moment they take a Prize."

And at p. 96:

"There cannot be such an adjudication of the capture in such a Port (friend or ally) as to give the captor a possession in full right; therefore, whatever is taken at sea must be brought into the Captor's own Port, or into their own Fleet, or place of security, for a full property is not obtained in them before. So that if they are retaken before they are so brought into the safe custody of the captor, the former owner may claim them; as no property therein has yet been vested in the enemy, and therefore not transferred to the recaptor, I say *former* because some kind of use, though not sufficient to confer a full Right, hath intervened."

The weight of authority in England supports the necessity of a condemnation, or at least of bringing the prize into a home port.

In *Goss v. Withers*, 2 Burrow's Rep. 638, Lord Mansfield speaks of having examined the practice of the Court of Admiralty and finding that

"They held the property not changed, so as to bar the owner in favor of a vendee or re-captor till there had been a sentence of condemnation."



In *Assievedo v. Cambridge*, 10 Mod. 77, it appears to have been held that 24 hours' possession was not sufficient to vest title in the captor if the prize was not brought *infra praesidia*.

In *March's New Cases*, at p. 110, it is said:

"If a ship be taken by piracy or if by letters of Mart and be not brought *infra praesidia* of that King by whose subject it was taken, that it is no lawful prize and the property not altered and therefore the sale void."

In *Wooddeson's Lectures*, vol. 2, p. 274, the author says:

"But the property is not completely vested so as to bar the former owner in favor of a rescuer or vendee, in case of recaption or sale, till there has been a sentence of condemnation in some foreign or domestic Admiralty Court."

In the *Flad Oyen*, 1 C. Rob., 135 (1799), Lord Stowell—then Sir William Scott—held that according to the general practice of nations a sentence of condemnation was necessary to transfer the property in prize, and that a condemnation by a prize court set up in neutral territory was insufficient.

The American rule requires that the captured vessel be brought within the jurisdiction of the captor's country in order to divest the title of the original owners, and that a sentence of condemnation must be duly pronounced by a competent court.

The necessity of bringing the captured vessel within the captor's jurisdiction was expressed in an opinion of Charles Lee as Attorney General, rendered Dec. 19, 1797, reported in 1 Op., 78.

In *Stewart v. United States*, 1 Court of Claims, 113, at p. 119, the Court said:

"The property of the original owner cannot be considered as fully divested until there has been

a condemnation by a regular prize tribunal having jurisdiction of the subject-matter. Until such adjudication is made, the right of recapture continues, as well as the right of *postliminii*. And in case the captured vessel escapes, is recaptured, or is voluntarily discharged, the jurisdiction of the prize court is lost, and all rights acquired by the capture are divested. (1 Kent's Com., 359.)"

In the *Manila Prize Cases*, 188 U. S., 254, the Supreme Court said (p. 260) :

"Ordinarily, the property must be brought in for adjudication, as the question is one of title which does not vest until condemnation."

Upon condemnation "the right attaches as of the time of the capture" (p. 278), but until then the right either of the individual captors or of the government is inchoate, and may be lost or given up, voluntarily or involuntarily, as the case may be.

See also:

*Miller v. The Resolution*, 2 Dallas, 1.  
*The Nassau*, 4 Wall., 634, 641.

A very clear light upon the situation with which the Court is called upon to deal in this case is thrown by the language of the Supreme Court in the case of *The Adventure*, 8 Cr., 221:—

The *Adventure* was a British vessel that had been captured by two French frigates. Part of the cargo having been taken out, the *Adventure* was duly presented to the American crews (then neutral) of two vessels which the frigates had just taken and burned. The *Adventure* was thereupon navigated by her donees to Norfolk, where she arrived on the 1st of October, 1812, and where she was promptly libelled by the acting captain and crew as their property acquired under the donation of the French captor. The United States interposed a claim for forfeiture

under the Non-Importation Act. At the time of her arrival, peace existed between this country and Great Britain; but on the 18th of June following, and pending the suit, war was declared between the last-named countries. The Supreme Court by Johnson, J., said:

"The very peculiar circumstances of this case require the application of a variety of principles; and the court has not been aided in its inquiries, by that elaborate discussion which such novel cases generally elicit. But they are relieved by the reflection, that the principles to which they must resort in forming their judgment are well established, and lead satisfactorily to a conclusion.

The most natural mode of acquiring a definite idea of the rights of the libelants in the subject-matter, will be to follow it through the successive changes of circumstances by which the nature and extent of the rights of the parties were affected. The capture, the donation, the arrival in the United States, and the state of war.

As between the belligerents, the capture undoubtedly produces a complete divesture of property. Nothing remains to the original proprietor but a mere *scintilla juris*, the *spes recuperandi*. The modern and enlightened practice of nations has subjected all such captures to the scrutiny of judicial tribunals, as the only practical means of furnishing documentary evidence to accompany ships that have been captured, for the purpose of proving that the seizure was the act of sovereign authority and not mere individual outrage. \* \* \* Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. *He could be in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander.* The vessel remained liable to British capture on the

whole voyage. And, on her arrival in a neutral territory, *the donee sunk into a mere bailee for the British claimant*, with those rights over the thing in possession which the civil law gave for care and labor bestowed upon it.

The question, then, occurs, is this a case of salvage?

On the negative of the proposition it is contended that it is a case of forfeiture, and therefore not a case of salvage as against the United States—that it was an unneutral act to assist the enemy in bringing the vessel *infra presidia*, or into any situation where the rights of recapture would cease, and therefore not a case of salvage as against the British claimant.

But the Court entertain an opinion unfavorable to both these objections.

This could never have been a case within the view of the legislature, when passing the Non-Importation Act. The ship was the plank on which the shipwrecked mariner reached the shore; and although it may be urged that bringing in the cargo was not necessarily connected with their own return to their country, yet, upon reflection, it will be found that this also can be excused upon very fair principles. It was their duty to adhere strictly to their neutral character; but to have cast into the sea the cargo, the property of a belligerent, would have been to do him an injury by taking away that chance of recovery subject to which they took it into their possession. Besides, bringing it into the United States did not necessarily presuppose a violation of the non-importation laws. If it came within the description of property cast casually on our shores, as we are of opinion it did, legal provision exists for disposing of it in such a manner as would comport with the policy of our laws. At last, they could but deliver it up to the hands of the government, to be reshipped by the British claimant, or otherwise appropriated

under the sanction of judicial process. And such was the course that they pursued. Far from attempting any violation of the laws of the country, upon their arrival here they deliver it up to the custody of the laws, and leave it to be disposed of under judicial sanction. The case has no one feature of an illegal importation, and cannot possibly have imputed to it the violation of law.

As to the question arising on the interest of the British claimant, it would, at this time, be a sufficient answer, that they who have no rights in this court, cannot urge a violation of their rights against the claim of the libellants. But there is still a much more satisfactory answer: To have attempted to carry the vessel '*infra presidia*' of the enemy, would, unless it could have been excused on the ground of necessity, have been an unneutral act. But when every exertion is made to bring it to a place of safety, in which the original right of the captured would revive and might be asserted, instead of aiding his enemy, it is doing an act exclusively resulting to the benefit of the English claimant."

Having determined the case to be one of salvage, the court, after fixing the amount to be allowed, proceeded:

"The next question arises on the application of the residue. On this point, the court is led to a conclusion by the following considerations:

*At the arrival of the vessel in the United States, the original British owner would, unquestionably, have been entitled to the balance.* The state of war, however, at present, prevents his interposing a claim in the courts of this country. But as this property was found within the United States at the declaration of war, it must stand on the same footing with other British property similarly situated."

It seems quite clear from the language of this decision that in the present case, even assuming that the capture,



of itself, divested their property, leaving only a *spes recuperandi*, all the rights of the British owners of the *Appam* and cargo were revived the moment the *Appam* was brought by the prize-master into our neutral waters.

If as between the German Empire and the British owners of the *Appam* the capture of the *Appam* by the Germans produced such a complete divesture of property as to make unnecessary the decree of a competent prize court, and if the commander of the *Möwe*, instead of sending the *Appam* to Norfolk in charge of a prize-master, had presented her to Americans, who subsequently brought her into Norfolk, then, as said in *The Adventure* (*supra*), upon her arrival in our neutral territory the donees would sink into mere bailees for the British owners, with such right of salvage in the thing in their possession as our admiralty law might give for the care and labor bestowed by the donees upon it in bringing it to a port of safety. The donees would be "in no better situation than a prize-master navigating the prize, in pursuance of orders from his commander."

In the case at bar we have a case of a prize-master navigating the prize into our port in pursuance of orders from his commander, contrary to the obligations of international law (under which the *Appam* should have been taken into a German port) and under the unfounded claim that the treaty with Prussia applied to such a case. In so doing it is clear, under the last-cited case, that unwittingly the prize-master was "doing an act exclusively resulting to the benefit of the English claimant."

The modern doctrine as to the vesting of title is admirably summed up by Mr. Pitt Cobbett in his *Leading Cases on International Law*, published in 1913 (pp. 204-5), as follows:

"In the case of neutral property taken as a prize, notwithstanding that the captor acquires immediate possession, the title of the owner will not be regarded

as completely divested unless and until a decree of condemnation has been passed, although in that event the divestment of title will date back to the original seizure. In the case of the property of subjects or allies taken as prize, as for illegal trading, the same principle would apply. In the case of enemy property, it is commonly laid down that as between captor and owner the divestment of title is complete as from the date of the original seizure; but in view of the fact that the captor is here, too, legally bound to proceed to adjudication and that the result of such adjudication may conceivably be in favor of the owner, it would seem that the same principle now applies to enemy property. If this be so, then we have a uniform rule with respect to title and its divestment, as between the captor and the original owner, whether enemy or neutral.

In the case where a captor loses possession of his prize before condemnation, either by abandonment or by recapture or rescue, then his inchoate right comes to an end. As regards abandonment, if this is voluntary and intentional, there can clearly be no further claim on his part, and the right of the original owner will thereupon revert, subject to any claim of salvage or new capture. In principle it would appear that the same rule should apply where the abandonment of the prize by the captor was involuntary, for the reason that his title is merely possessory, and dependent on the retention of control, either actual or constructive. In cases of rescue, and now also on recapture, the right of the original owner will revert, although subject to any lawful claim of salvage. But if, after recapture, the prize should be taken anew by the enemy, then the title will vest in the last captor, to the exclusion of any claim on the part of the original captor."

From a practical standpoint, it is immaterial for the purposes of the present discussion whether title to a belligerent prize vests upon capture or not until adjudication, although the anxiety manifested by the German Ambassador and the diligence exercised by the German authorities in the matter of the institution of prize proceedings in Germany clearly indicate that they believed condemnation to be a prerequisite to the complete vesting of title.

Between capture and adjudication a belligerent vessel captured is in the category of "prize" and is subject to the rules, regulations and limitations applicable to this class of vessels. She is not a public armed vessel or a merchantman of the capturing belligerent. She is simply a prize not yet adjudicated.

It has already been demonstrated that when an uncondemned prize is brought into a neutral port under circumstances other than those expressly recognized as permissible she must be restored to the private owners whose possession has been temporarily displaced by the capture. This is the law and this is the practical result.

Any academic discussion as to the technical status of the bare legal title to the vessel between the capture and the restitution is beside the mark. The *Appam* is a prize; that is all sufficient for the purposes of this suit.

In any event, as held by the Supreme Court in the case of *Santissima Trinidad*, 7 Wheaton, at page 355, the pendency of prize proceedings in a foreign court cannot be set up against the jurisdiction of our courts to deal with a *res* actually in their custody.

The case of the *Mary Ford* (3 Dall., 188), upon which appellants lay so much stress (Appellants' Brief, p. 23) is not a controlling authority. There was no opinion rendered by the Supreme Court, but merely a very brief memorandum affirming the result of the decision in the Circuit Court. This decision was rendered in 1794, when the whole law of prize was in a very unsettled condition. The conclusion reached is entirely incon-

sistent with the later decision in the case of *The Adventure* (*supra*), which must be regarded as overruling *pro tanto* the earlier decision.

In the cases of the *Josefa Segunda* (5 Wheat., 338) and the *Sally Magee* (3 Wall., 451), there was evident collusion and an attempt to evade the laws of the United States.

The claim that title to a belligerent prize vests absolutely and indefeasibly by the mere fact of capture, in the same sense that title to land vests upon a lawful purchase and conveyance, cannot be sustained.

#### POINT VII.

**The Appam is not a German public vessel or entitled to the exemptions of a public vessel.**

The classification of vessels into public and private is not complete and exhaustive. A proper classification is rather as follows:

1. Private vessels:

- (a) Merchant vessels.
- (b) Yachts.

2. Public vessels:

- (a) Warships.
- (b) Government ships used for peaceful purposes, as for example, lighthouse tenders, revenue cutters, and the like.

3. Prizes.

The *Appam* was avowedly in the category of prize. She was claimed in the answer of the respondents as

"prize of war" (Rec., p. 3). On February 2, 1916, the German Ambassador wrote to the Secretary of State:

"The *Appam* has not been converted into an auxiliary cruiser, is not armed and has made no prize under Mr. Berg's command." (State Dept., Dipl. Corr. European War No. 3, p. 331.)

A Memorandum from the German Embassy received by the Department of State, February 8, 1916, states:

"*Appam* is not an auxiliary cruiser but a prize. Therefore, she must be dealt with according to Article XIX of the Prusso-American Treaty of 1779." (*Id.*, p. 333.)

A Note from the German Embassy of February 22, 1916, says:

"The *Appam* was \* \* \* brought to the Virginian port as a prize ship." (*Id.*, p. 334.)

An uncondemned prize stands in a category by herself. She may, after condemnation, be sold to a private purchaser and become a private vessel under new ownership, or she may be appropriated to public uses, pacific or belligerent. She may, in certain exceptional cases, be converted into a public vessel even before condemnation. But to effect this she must be regularly commissioned as such by some competent authority. She may then become entitled to the exemptions of a public vessel. This was done in the case of *The Exchange* (7 Cranch., 116), and it was on this specific ground that *The Exchange* was held not to be subject to the jurisdiction of our courts.

So, in the case of *The Farn*, referred to by the appellants at page 33 of their brief, it appeared that she had been in the possession of the captor for more than



three months, and used as a fleet auxiliary or tender, and was officered and manned by Germans. For this reason she was treated by the United States Government as an "auxiliary to a belligerent fleet." She had put in at San Juan, Porto Rico, on January 12th, 1915, "for provisions and water," a permitted purpose. On or about January 22nd, she was ordered to leave within twenty-four hours, and failing to do so she was interned on January 25th. The original request of the British Ambassador, made on January 13th, was for "the detention of this vessel in the interests of a proper observance of neutrality." Apparently no steps were taken by the original owners. (See State Dept., Diplomatic Correspondence, European War, No. 2, pp. 139, 140.)

In like manner, in the case of *The Tuscaloosa*, discussed by the appellants on pages 66 and 67 of their brief, she was restored expressly on the ground that she had been commissioned as a ship of war, and converted into a tender to the *Alabama*. (See Semmes, *Memoirs of Service Afloat*, pp. 739-743.)

In the "Geneva Award," whereby the "Alabama claims" were disposed of, the tribunal determined as follows:

"And so far as relates to the vessels called *The Tuscaloosa* (tender to the *Alabama*), *The Clarence*, *The Tacony*, and *The Archer* (tenders to *The Florida*),

The tribunal is unanimously of opinion—

That such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively."

(Molloy, *Treaties, &c.*, 1776-1909, Vol. 1, p. 721.)

In general, the experience of Admiral Semmes demonstrated that it was the universal rule of neutral powers to exclude prizes, or to restore them for violations of neutrality. In 1861, when commanding the *Sumter*, he took several prizes into a Cuban port, and asked that Spain would permit him "to leave the captured vessels within her jurisdiction, until they can be adjudicated by a Court of Admiralty of the Confederate States" (Semmes, *Memoirs of Service Afloat*, p. 139). This request was refused, and as Semmes says:

"My prizes were delivered—to whom, do you think, reader? You will naturally say, to myself or my duly appointed agent, with instructions to take them out of the Spanish port. This was the result to be logically expected. The Captain-General had received them in trust, as it were, to abide the decision of his Government. If that decision should be in favor of receiving the prizes of both belligerents, well; if not, I expected to be notified to take them away. But nothing was further, it seems, from the intention of the Captain-General, than this simple and just proceeding, for as soon as the Queen's proclamation was received, he deliberately handed over all my prizes to their original owners" (*Id.*, p. 141).

He found that Great Britain and France, as well as Spain, excluded prizes (*Id.*, pp. 100, 133), and so did Brazil and the South American Republics (*Id.*, pp. 161, 162), and he sums up his experience in this matter by saying (p. 386):

"In short during my whole career upon the sea, I had not so much as a single port open to me into which I could send a prize."

It is not to be supposed that International Law has gone backward or that the obligations of neutrality

have diminished, since the days of the *Sumter* and the *Alabama*.

Nothing whatever has been done to take the *Appam* out of the category of prize, and convert her into a public vessel, or devote her to public use. She *would* not, as a German public vessel, bring several hundred prisoners to the United States for the purpose of setting them free. She *could* not bring them here to hold them as prisoners in our territorial waters without manifestly violating our neutrality, as she in fact did in this respect. She was and is a prize, and nothing but a prize, and having violated our neutrality, she is subject to restitution.

If the *Appam's* crew should be augmented so as to be able to take the vessel to a German port, they would constitute a military expedition bringing in the spoils of war. But that would not constitute the *Appam* herself a public ship until condemnation and conversion, and this fact does not make the *Appam* "subject to the disabilities of a ship of war," as claimed by appellants (brief, p. 57), and hence "entitled to the immunities incident to that character." *She* is not under the disability; it is her crew who are under the disability, due to the express prohibition of the American statutes against organizing "any military expedition or enterprise to be carried on from thence [the United States] against the territory or dominions of any foreign prince or state, or of any colony, district or people with whom the United States are at peace" (U. S. Rev. Stat., sec. 5286). To hold and then bring in the spoils of war is certainly a military enterprise against the dominions of the power from whom the spoils were taken, and our statute expressly condemns "any person who within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for" any such enterprise.

The neutrality regulations applicable to the Panama Canal Zone, referred to by appellants (brief, p. 56), do not recognize prizes as public vessels analogous to vessels of war. These regulations merely provide that in passing through the Canal prizes shall be subject to the same restrictions as war vessels. In other words, a prize may be sent through the Panama Canal, but, while passing through, she must do and refrain from doing the same things as a war vessel. This does not constitute a recognition of prizes as public vessels. Moreover, such use of the Canal is necessarily temporary.

The case of the *Sitka*, discussed by the appellants at pages 64 and 65 of their brief, is not in point. There the prize was under the direct convoy of an armed public vessel. She came into San Francisco Bay in company with a war vessel. She came in temporarily and not to lay up, and she was able to and did sail out again without delay. The question discussed by the Attorney General arose on a complaint by the Governor of California to the President that a writ of *habeas corpus* issued by a California court to inquire into the detention of certain prisoners on board the prize had been disregarded by the prize master, who sailed away after the writ had been served upon him. The Attorney General's ruling was, in essence, merely that the immunity of the war vessel extended to the prize which was in her company, and that the prize master's disregard of the writ of the California court was not an affront to the United States. No question of violation of neutrality appears to have been involved or discussed.

It is also to be observed that the Attorney General said (7 Op., 122):

"The United States might, if they pleased, exclude prizes of war from their ports, either absolutely or under qualification, in favor of cases of

mere distress or previous condemnation or non-accessibility of any port of the belligerent power itself, but the United States have not, in fact, done this, and the faculty of doing it is a political one and foreign to the powers and duties of the courts, whether of the states or of the United States."

This is exactly what has since been done by the proper Department of the United States, when the Senate expressly rejected Article 23 of the Hague Convention XIII and acceded to Articles 21 and 22, thus proclaiming to the world that it was the policy of the United States to admit prizes of war only "under qualification, in favor of cases of mere distress," as phrased by the Attorney General, but otherwise to exclude them.

If prizes still uncondemned were public vessels, the whole Hague Convention on the subject, and the jurisprudence of this court in such cases from the "*Betsey*" down, would be mere absurdities.

#### POINT VIII.

The sending of a prize to a neutral port with a prize crew insufficient to navigate her, and with intention to lay her up, is equivalent to an abandonment and thereby divests the captors' inchoate right.

Appellants expressly admit that the prize crew is "insufficient of itself to operate the ship" (appellants' brief, p. 22). The prize master and crew, therefore, cannot take the *Appam* out and navigate her safely to a German port. Through their own act in bringing her into an American port they necessarily lost the services of her own officers and crew, who had previously, under compulsion, made her operation possible. They could not hold them on the *Appam* as prisoners of war, working under continued compulsion, without violating



American neutrality, and the *Appam's* own officers and crew were accordingly released by order of this Government.

As already pointed out, the prize crew cannot be augmented here without violating the provisions of the American neutrality laws, as this would constitute the organization of a military expedition having for its object the transportation of an uncondemned prize to the captor's country for adjudication. It has also been shown that, under general international law, no valid adjudication can be rendered by the courts of the captor's country while the prize is still outside of that country's jurisdiction.

In contemplation of law, therefore, the *Appam* is just as effectually abandoned as if the prize master and crew had taken to the boats and rowed away. They cannot hold her in one of our ports as a place of safe-keeping without violating our neutrality. They cannot take her away without violating our neutrality. Their mere physical presence on the vessel, therefore, does not constitute lawful possession, and she must be regarded as abandoned.

To hold a capture merely by putting on board a prize master, with or without a small crew, the prize master must actually bring the prize into a home port for condemnation. This was the doctrine of *The Alexander*, 8 Cranch, 169, referred to by appellants on page 22 of their brief. There the vessel was actually brought into an American port by the American prize master and then successfully proceeded against in the American courts.

It is the actual bringing of the prize into a port of the captor's country, or, in the language of the old cases, *infra præsidia*, which demonstrates the sufficiency of the possession. Unless and until this is done, possession, in order to be effective, must be such as to enable the captor to operate the vessel, either with his own crew or with the original crew working under his orders.

The general rules are well laid down in an early case in Pennsylvania:

*Wilcocks et al. v. Union Ins. Co.*, 2 Binney 574,  
at p. 578.

This was an action on a marine insurance policy, and the question was whether there had been a total loss by capture. Chief Justice Tilghman charged the jury as follows:

"As to the duty of the crew, they are not obliged to navigate the vessel; the captors therefore should take care to put sufficient force of their own on board. Should they send but a single hand, or so few that it was manifestly impossible to work her, this would not be taking sufficient possession. In that case the neutrals are not obliged to submit their property and lives to the mercy of the winds and waves, and may lawfully consider her as abandoned to them, and act accordingly. But if a force insufficient to work the vessel is put on board by the captors, in consequence of the promise of the neutral crew, to navigate her to the destined port, they are bound by such promise, and must be considered, for the purpose agreed on, as the hands of the captors. If, in violation of their promise, they take the vessel into their own hands, I am of opinion that it is an unlawful rescue."

In 1838 Attorney General Grundy rendered an opinion (3 Op. 377) in which he said:

"By the well settled principles of international law, it is made the duty of the captors to place an adequate force upon the captured vessel; and if from a mistaken reliance on the sufficiency of their force, or misplaced confidence they fail to do so, the omission is at their own peril."

Under the prize laws of the United States, the failure to bring proceedings with due diligence in a competent court for an adjudication of prize is in itself ground for the release of the vessel.

See:

*U. S. Rev. Stat.*, sec. 2645.

In like manner, the German Prize Code provides for the bringing of proceedings for condemnation in due season. As already shown, in order to make such proceedings internationally effectual, the *res* must be within the actual jurisdiction of the court. Here the *res* is in the custody of our Court, and the pendency of proceedings in a German prize court is mere *brutum fulmen*, under the decision in the *Santissima Trinidad*, 7 Wheat., at p. 355.

The captors of the *Appam* having themselves put it out of their own power to bring the vessel within the jurisdiction of a German prize court and subject her to adjudication, they must be deemed to have abandoned her, and she should accordingly be restored to her owners by analogy to the practice of American prize courts as above indicated.

The insufficiency of the German prize crew does not constitute "unseaworthiness," as the term is used in international law, and, especially in Article 21 of the Hague Convention, and the claim to this effect set up in appellants' answer (Rec., p. 8) is both unsound and disingenuous. The existing conditions in this respect have been caused by their own acts. They cannot thus voluntarily render her unable to go to sea and then claim the benefit of such self-imposed "unseaworthiness."

There is no inconsistency between the theory of violation of neutrality and the theory of abandonment, as claimed by appellants (brief, p. 23). The two theories are alternative. Either the German government intended to violate our neutrality by making an American port a place of depot or a recruiting station, or they, in effect, abandoned the prize. In either case the same result of restitution to the owner follows as the legal consequence.

## POINT IX.

**Restitution to the owner is the appropriate and only adequate remedy.**

The appellants contend with much show of earnestness that even if there has been a violation of neutrality by the German captors, or an abandonment of the vessel, nevertheless, restitution to the owner should not be awarded (appellants' brief, pp. 42-54). In support of this argument, they set up a man of straw and then proceed to demolish him. They say, at page 43:

"If the mere bringing of a prize into our waters required restitution, then in every such case restitution would be ordered and inquiry into the circumstances of the capture would be unnecessary."

Nothing of the sort has been claimed. It is recognized that a prize may be brought in temporarily for repairs or provisions or to escape stress of weather. The inquiry to be made by our courts is whether the prize was brought in for these permitted purposes, and, if so, whether she remains longer than her necessities require. If she acts otherwise, then she is, in the language of the Hague Convention, to be "released." If released, she must necessarily revert to her owners, since the temporary adverse possession of the captors is thus removed. This, however, was no new invention of the Hague Conference. Its roots go back at least to the edict of the States General of Holland of 1658, already cited, which expressly provided that, in such event:

"The prize should be restored to the former owners as though it had never been taken."

In the *Consolato del Mare*, first printed in 1494, but of much earlier origin (Benedict's Admiralty, Sec. 119) it was provided that in cases of the recapture or abandonment of prizes, the recaptors or salvors should not be entitled to the vessel (except where the recapture was

"effected within the enemy's territories, or in a place where the enemy was in entire possession of his prize") and that "the vessel, and all that is in her, shall be restored to the former proprietors, or payment of a reasonable salvage." See 5 Wheat., Appendix, pp. 56-58.)

This shows conclusively that under international law, both ancient and modern, the mere fact of capture does not vest an indefeasible or complete title in the captors.

In all cases where a prize in a neutral port has been taken away from her captors by either executive or judicial action, she has invariably been restored to her owners and not interned. If in such circumstances a prize were interned, the question would immediately arise: To whom should she be delivered upon the conclusion of the war? This very pertinent question was put by the British Ambassador to the Secretary of State, in a note of March 26th, 1915, in regard to the *Farn*. It does not appear what answer, if any, has been made to this enquiry, and the question may well prove a troublesome one at the end of the war.

See *Dept. of State, Diplomatic Correspondence, European War, No. 2, p. 141.*

It is inconceivable that a belligerent should be allowed to keep his spoils of war in one of our ports; that the only control which our government can exercise is "to determine how long and upon what conditions" this may be done (appellants' brief, p. 117); and that there should be no remedy either to the ousted owners through the courts or to the injured belligerent through the executive. If internment were the only remedy, the captor's chief purpose, of securing a place of safe keeping for his spoils, would be accomplished. Moreover, the German Government has expressly disclaimed and objected to internment in this case (see *ante*, p. 79).

The executive department held in regard to this case that the court had rightfully taken jurisdiction and could retain it until a determination of the controversy. It only remained for the court to apply and enforce the law



and vindicate our neutrality by awarding restitution, and this the court below did. That such restitution is made by court decree rather than by executive action is the result of the historic development of our judicial and diplomatic precedents. The remedies are concurrent; neither excludes the other; but for many years it has been the policy of this government to leave such questions to the courts rather than to dispose of them summarily by executive action (see Chief Justice Marshall's opinion in the *Santissima Trinidad*, in the Circuit Court, *ante*, p. 58). Whatever diplomatic recourse may have been, or may still be, open to the British Government, the proper remedy for the owners was in the courts. They were within their rights in invoking this remedy and they are entitled to the relief which the court below awarded.

#### Recapitulation and Summary.

1. By deliberately sending the *Appam* to an American port, twice as far away as the nearest German port, with instructions "there to lay up," the captors wilfully violated American neutrality.
2. By attempting to use an American port as a place of depot for the spoils of war, the captors wilfully violated American neutrality.
3. By attempting to use an American port as a place for the confinement of prisoners of war, the captors wilfully violated American neutrality.
4. By sending the *Appam* to an American port to keep secret as long as possible and thus aid the operations of the commerce raider *Möwe*, the captors wilfully violated American neutrality.
5. The *Appam's* entrance into an American port in the circumstances shown in this case was a violation of American neutrality, since she was not driven in by unseaworthiness, stress of weather or lack of fuel or provisions.

6. Any shortage of fuel or provisions when she entered was caused by the voluntary act of her captors in taking her across the Atlantic instead of proceeding half the distance to a German port.

7. Irrespective of the character of her entrance, the *Appam's* detention after a reasonable time to supply any shortage of fuel or provisions violated American neutrality. Such "reasonable time" expired before the filing of the libel.

8. The Prussian treaty did not justify the *Appam's* entry or her detention. She did not come in under convoy of a public armed vessel or for temporary refuge.

9. The provisions of Articles 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of accepted international law. Under the rules of international law embodied in these provisions, the *Appam* must be released to her owners.

10. The rejection by the United States of Article 23 of the Hague Convention was notice to the world that the United States would not admit prizes except under the circumstances specified in Article 21.

11. There was no necessity for a notice to the *Appam* to depart, because she did not come in for a permitted purpose, and in any event her prize crew were insufficient to take her out.

12. The title of the *Appam's* owners was not divested by the capture. The captors acquired only a temporary right of possession and an inchoate title, which they have lost by violating American neutrality and by abandonment.

13. Irrespective of the question of title, the *Appam* is in the category of prize, and, as an uncondemned

prize, is subject to restitution for violation of neutrality.

14. The act of bringing in the *Appam* with a prize crew insufficient to take her out again and navigate her safely to a German port constitutes an abandonment.

15. Upon a termination of the captors' rights, either by abandonment or by executive or judicial release for violation of neutrality, the prize must be restored to her owners.

16. Restitution should be awarded for any violation of neutrality in connection with the prize, whether in the captor's character or in the capture itself or in the captor's conduct subsequent to the capture.

17. The questions presented in this case are justiciable and the court below properly exercised its jurisdiction to determine them and to award restitution of the *Appam* and her cargo to their respective owners under the law of nations as accepted, recognized and applied by the United States.

### CONCLUSION.

The decrees appealed from should be in all respects affirmed with costs and the mandates should issue immediately upon the decision, so that the decrees may be carried into execution and actual possession delivered to the owners without further delay.

Respectfully submitted, this 2nd day of January, 1917.

FREDERIC R. COUDERT,  
HOWARD THAYER KINGSBURY,  
JAMES K. SYMMERS,  
HERBERT BARRY,  
FLOYD HUGHES,  
RALPH JAMES M. BULLOWA,  
Counsel for Appellees.

## APPENDIX A.

## Treaty Provisions.

(8 *U. S. Stat.*, pp. 172, 173.)

## Treaty with Prussia, 1799.

## Article XIX.

The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty or of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to shew. But conformably to the treaties existing between the United States and Great Britain, no vessel, that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests or any other danger, or accident of the sea, they shall be

## FRENCH TEXT.

## Article XIX.

Les vaisseaux de guerre publics et particuliers des deux parties contractantes pourront conduire en toute liberté partout où il leur plaira, les vaisseaux et effets qu'ils auront pris sur leurs ennemis, sans être obligés de payer aucuns impôts, charges ou droits, aux officiers de l'amirauté, des douanes ou autres. Ces prises ne pourront être non plus ni arrêtées, ni visitées, ni soumises à des procédures légales en entrant dans le port de l'autre partie, mais elles pourront en sortir librement, être conduites, en tout temps par le vaisseau preneur aux endroits portés par les commissions, dont l'officier commandant ledit vaisseau sera obligé de faire montre. Mais conformément aux Traités subsistants entre les Etats-Unis et la Grande Bretagne, tout vaisseau qui aura fait une prise sur des sujets de cette dernière puissance, ne saurait obtenir un droit d'asile dans les ports des

obliged to depart as soon as possible.

Etats-Unis et s'il est forcé d'y relâcher par des tempêtes ou quelque autre danger ou accident de mer, il sera obligé d'en repartir le plutôt possible.

**Treaty with Prussia, 1828.**

*(Id. p. p. 314, 315.)*

**Article XII.**

The twelfth article of the treaty of amity and commerce, concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to the treaties with Great Britain, are hereby, revived with the same force and virtue, as if they made part of the context of the present treaty; it being, however, understood that the stipulations contained in the articles thus revived, shall be always considered as in no manner affecting the treaties or conventions concluded by either party with other powers during the interval between the expiration of the said treaty of 1799, and the commencement of the operation of the present treaty.

The parties being still de-

**Article XII.**

**FRENCH TEXT.**

L'article douze du traité d'amitié et de commerce, conclu entre les parties en 1785; et les articles 13 et suivans, jusqu'à l'article vingt-quatre, inclusivement, du traité conclu à Berlin, en 1799, en exceptant le dernier paragraphe de l'article dix-neuf, touchant les traités avec la Grande-Bretagne sont remis en vigueur, et auront la même force et valeur que s'ils faisaient partie du présent Traité; il est entendu cependant que les stipulations contenues dans les articles ainsi remis en vigueur, seront toujours censés ne rien changer aux Traités et Conventions conclus de part et d'autre, avec d'autres puissances, dans l'intervalle écoulé entre l'expiration dudit Traité de 1799, et le commencement de la mise en vigueur du présent Traité.

Les Parties Contractantes désirant toujours



sirous, in conformity with their intentions declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime powers, further provisions to ensure just protection and freedom to neutral navigation and commerce, and which may, at the same time, advance the cause of civilization and humanity, engage again to treat on this subject, at some future and convenient period.

conformément à l'intention déclarée dans l'Article douze dudit Traité de 1799, pourvoir, entre Elles, ou conjointement avec d'autres Puissances Maritimes, à des stipulations ultérieures qui puissent servir à garantir une juste protection et liberté au commerce et à la navigation des neutres, et à aider la cause de la civilisation et de l'humanité, l'engagent ici, comme alors à concerter ensemble sur ce sujet, à quelque époque future et convenable.

**Treaty with Sweden, 1783.**

*(Ed. p. p. 72, 73.)*

**FRENCH TEXT.**

**Article XIX.**

**Article XIX.**

The ships of war of his Swedish Majesty and those of the United States, and also those which their subjects shall have armed for war, may with all freedom conduct the prizes which they shall have made from their enemies into the ports which are open in time of war to other friendly nations; and the said prizes upon entering the said ports shall not be subject to arrest or seizure, nor shall the officers of the places take cognizance of the validity of the said

Les vaisseaux de guerre de sa Majesté Suédoise et ceux des Etats Unis, de même que ceux que leurs sujets auront armés en guerre, pourront, en toute liberté conduire les prises qu'ils auront faites sur leurs ennemis, dans les ports ouverts en tems de guerre aux autres nations amies, sans que ces prises, entrant dans les dits ports, puissent être arrêtées ou saisies, ni que les officiers des lieux puissent prendre connoissance de la validité de dites prises, les quelles

prizes, which may depart and be conducted freely and with all liberty to the places pointed out in their commissions, which the captains of the said vessels shall be obliged to shew.

pourront sortir et être conduites franchement et en toute liberté aux lieux portés par les commissions, dont les capitaines des dits vaisseaux seront obligés de faire montre.

### **Treaty with Great Britain, 1794.**

#### **Article XXV (Ed. p. - 128.)**

It shall be lawful for the ships of war and privateers belonging to the said parties respectively, to carry withersoever they please, the ships and goods taken from their enemies, without being obliged to pay any fee to the officers of the Admiralty, or to any Judge whatever; nor shall the said Prizes when they arrive at, and enter the ports of the said parties, be detained or seized, neither shall the searchers or other officers of those places visit such prizes, (except for the purpose of preventing the carrying of any part of the cargo thereof on shore in any manner contrary to the established laws of revenue, navigation or commerce) nor shall such officers take cognizance of the validity of such prizes; but they shall be at liberty to hoist sail, and depart as speedily as may be, and carry their said prizes to the place mentioned in

their commissions or patents, which the commanders of the said ships of war or privateers shall be obliged to show. No shelter or refuge shall be given in their ports to such as have made a prize upon the subjects or citizens of either of the said parties; but if forced by stress of weather, or the dangers of the sea, to enter therein, particular care shall be taken to hasten their departure, and to cause them to retire as soon as possible. Nothing in this Treaty contained shall, however, be construed or operate contrary to former and existing public treaties with other sovereigns or states. But the two parties agree, that while they continue in amity, neither of them will in future make any treaty that shall be inconsistent with this or the preceding article.

## Treaty with France, 1778.

(A. P. P. 22, 23.) FRENCH TEXT.

## Article XVII.

It shall be lawful for the ships of war of either party, and privateers, freely to carry whithersoever they please, the ships and goods taken from their enemies, without being obliged to pay any duty to the officers of the admiralty or any other judges; nor shall such prizes be arrested or seized when they come to and enter the ports of either party; nor shall the searchers or other officers of those places search the same, or make examination concerning the lawfulness of such prizes; but they may hoist sail at any time, and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to show; on the contrary, no shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people or property of either of the parties; but if such shall come in, being forced by stress of weather, or the danger of the sea, all proper means shall be vigorously used,

## Article XVII.

Les vaisseaux de guerre de sa Majesté Très Chrétienne et ceux des Etats-Unis, de même que ceux que leurs sujets auront armés en guerre, pourront, en toute liberté, conduire où bon leur semblera les prises qu'ils auront faites sur leurs ennemis, sans être obligés à aucuns droits, soit des sieurs amiraux ou de l'armirauté ou d'aucuns autres, sans qu'aussi lesdits vaisseaux ou les d<sup>e</sup> prises, entrant dans les hâvres ou ports de sa Majesté très Chrétienne ou des Etats-Unis, puissent être arrêtés ou saisis, ni que les Officiers des lieux puissent prendre connaissance de la validité des d<sup>e</sup> prises, lesquelles pourront sortir et être conduites franchement et en toute liberté aux lieux portés par les commissions dont les capitaines desdits vaisseaux seront obligés de faire aparoir. Et, au contraire, ne sera donné asile ni retraite dans leurs ports ou hâvres à ceux qui auront fait des prises, sur les sujets de sa Majesté ou desdits Etats-Unis; et s'ils sont forcés d'y entrer par tem-

that they go out and re- tire from thence as soon as possible.

pête ou péril de mer, on les fera sortir le plutôt possible.

**Treaty with France, 1800.**

*(Ad. P. P. 190, 191.)* FRENCH TEXT.

**Article XXIV.**

When the ships of war of the two contracting parties, or those belonging to their citizens which are armed in war, shall be admitted to enter with their prizes the ports of either of the two parties, the said public or private ships, as well as their prizes, shall not be obliged to pay any duty either to the officers of the place, the judges or any others; nor shall such prizes when they come to and enter the ports of either party, be arrested or seized, nor shall the officers of the place make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to shew. It is always understood that the stipulations of this article shall not extend beyond the privileges of the most favored nation.

**Article XXIV.**

Lorsque les vaisseaux de guerre des deux parties contractantes, ou ceux que leurs citoyens auraient armés en guerre seront admis a relâcher, avec leurs prises, dans les ports de l'une des deux parties, lesdits vaisseaux publics ou particuliers, de même que leurs prises, ne seront obligés à payer aucun droit, soit aux officiers du lieu, soit aux juges ou a tous autres; lesdites prises entrant dans les havres ou ports de l'une des deux parties, ne pourront être arrêtées ou saisies, et les officiers des lieux ne pourront prendre connaissance de la validité desdites prises, lesquelles pourront sortir et être conduites en toute franchise et liberté aux lieux portés par les commissions dont les capitaines desdits vaisseaux seront obligés de faire apparoir. Il est toujours entendu que les stipulations de cet article ne s'étendront pas au delà des privilèges des nations les plus favorisés.

## APPENDIX B.

Extracts from Transcript of Record in U. S. Supreme  
Court in Glass vs. The Sloop Betsy.

THE UNITED STATES OF AMERICA,

District of Maryland, to wit—

At a Circuit Court of the United States held at the  
Court house in Easton in and for the said District on  
Thursday, the seventh day of November, in the year  
of Our Lord one thousand seven hundred and ninety-  
three—

Present: The Honorable William Paterson, Esquire,  
Judge, Nathaniel Ramsey, Esqr., Marshall, Philip  
Moore, Clk.

Among other were the following Proceedings, Vizt.

ALEXANDER S. GLASS, THOMAS  
MASON, JOHN HERDMAN, JOHN  
HOUSEMAN, WILLIAM MASHITER,  
GILES MARDENBROW, LUCAS  
GIBBS and HENRY GIBBS,

VS.

THE SLOOP BETSY and CARGO  
and CAPT. JOHANNENE.

BE IT REMEMBERED, that heretofore, to wit on the said  
seventh day of November, Robert Smith, Proctor for  
the Appellants, files to the Court here the following Libel  
of Appeal—to wit—

To the Honorable the Judges of the Circuit Court of the  
District of Maryland.



The Libel and Appeal of Alexander S. Glass, a Citizen of the State of New York in the United States of America, and of Thomas Mason, John Herdman, John Houseman, William Mashiter, Giles Mardenbrow, Lucas Gibbes and Henry Gibbes of the Island of St. Bartholomew and Subjects of the King of Sweden, Sheweth, That your Libellants and Appellants on the sixteenth day of July in the year seventeen hundred and ninety-three, did exhibit their libel in Admiralty Court of the said District of Maryland before the Honorable William Paca, Esquire, Judge of the said District against a certain Pierre Arcade Johannene, Captain of an Armed Schooner called *The Citizen Genet*, setting forth that the Sloop *Betsy* and her cargo, being neutral Property as therein Specified were forcibly seized as Prize by the defendant the said Johannene on a voyage from the Islands of St. Bartholomew to the Port of Baltimore, and there now detained by the Defendant contrary to the Law of Nations, to the Laws of the United States and to the Treaties now subsisting between the Republic of France and the King of Sweden, and therefore praying restitution of the said Sloop *Betsy* and her cargo and also Damages as in the Libel in the Record herewith produced will more fully appear—That the said Pierre Arcade Johannene by counsel did appear and in Bar of the jurisdiction of the Court did plead the several matters and things contained at large in the Plea set forth in the said record to which plea your Libellants and Appellants did reply as will appear by a reference to the said record—And the same cause being at issue, it came to be heard before the said Honorable Judge of the said District when your Libellants and Appellants were ready and offered to prove all the several matters and things set forth in the said libel and all of which they were and still are ready to prove, but were precluded from offering any proof thereof by the opinion of the said District Court of the District of Maryland and altho no evidence was offered by the Defendant to prove the said Vessel

and cargo to be the property of any British subject, or of any other subject or citizen of a power now at war with the Republic of France or that the said vessel and cargo were liable to Capture, His Honor was pleased to order and adjudge that the said Plea to the jurisdiction of the Court be allowed and held good for the first cause stated in the Plea and that the Libel aforesaid be dismissed—That your Libellants and Appellants are advised the said Decree is erroneous and humbly appeal therefrom to this Honorable Court. There Libellants and Appellants therefore pray that this Honorable Court may hear the said cause and will be pleased to reverse the said Decree, or grant to these Libellants such relief in the Premises as to this Honorable Court shall seem meet—and your Libellants shall every pray, &c.

ROBERT SMITH,  
Proctor for the Libellants  
and Appellants.

And produces to the Court here also the Record and Proceedings of the District aforesaid mentioned in the Libel of Appeal aforesaid which follows in these words.

To wit—

THE UNITED STATES OF AMERICA,

District of Maryland, Sst.

At a Special District Court held at the Court House in Baltimore Towne in and for the said District on the fifth day of August, seventeen hundred and ninety-three.

Present.

The Honorable William Paca, Esquire, Judge,  
Nathaniel Ramsey, Esquire, Marshall,  
Philip Moore, Clk.

Among other were the following Proceedings, Vizt.

ALEXANDER S. GLASS, THOMAS  
MASON, JOHN HERDMAN, JOHN  
HOUSEMAN, WILLIAM MASHITER,  
GILES MARDENBROW, LUCAS  
GIBBES and HENRY GIBBES,

vs.

THE SLOOP "BETSY" and CARGO  
and CAPTN. JOHANNENE.

To William Paca, Esquire, Judge of the District Court of the United States for the District of Maryland:

The Libel of Alexander S. Glass, a citizen of the State of New York in the United States of America, and of Thomas Mason, John Herdman, John Houseman, William Mashiter, Giles Mardenbrow, Lucas Gibbes and Henry Gibbes of the Island of St. Bartholomew and Subjects of the King of Sweden, Humbly Sheweth—

That your Libellant Alexander S. Glass is and at the time of the Capture herein after mentioned was a Citizen of the said State of New York, and that Thomas

Mason, John Herdman, John Houseman and William Mashiter, Subjects aforesaid of the King of Sweden, are the true owners of the Sloop *Betsy* whereof William Johnston, a subject also of the King of Sweden, is Master and which said Sloop is now lying in the Port of Baltimore and within the jurisdiction of this Court—and Libellants the said Alexander S. Glass, Giles Mardenbrow, Lucas Gibbes, Henry Gibbes, Thomas Mason, John Herdman, John Houseman and William Mashiter are the true owners of the Cargo on board the said Sloop the Particulars whereof are expressed and specified in the Exhibit herewith filed marked No. 1—which said cargo was in due form of law consigned to the said Lucas Gibbes and Alexander S. Glass as by the Bills of Lading will appear—That the said Sloop with her cargo being on her voyage from the Islands of St. Bartholomew to the Port of Baltimore for which Port she was cleared out and destined and being within Five miles of the sea coast of the United States received an American Pilot on board for the purpose of conducting her safely up the Chesapeake Bay to the said Place of her destination, that after receiving the said Pilot on board she continued on the same voyage until she had arrived within two miles of Cape Henry, the Southern Promontory of the Chesapeake Bay where she, with her cargo was, on the twenty-first day of June in the year of our Lord one thousand seven hundred and ninety-three forcibly seized and taken possession of by a number of armed men under the control and command of Pierre Arcade Johanne, a Citizen of the Republic of France, and Captain of an armed schooner called the *Citizen Genet*, as a prize, and the same Sloop with her Cargo so seized, was taken to the said Port of Baltimore by the said Pierre Arcade Johanne and by him hath since been there detained and yet is in his possession and the said Pierre Arcade Johanne threatens to sell the said Sloop and Cargo—

Your Libellants not admitting that the said Pierre

Arcade Johanne was duly commissioned and authorized by the Republic of France to make Prizes of vessels belonging even to the enemies of the Republic of France humbly insist that the said seizure and Capture of the said Swedish Sloop and her cargo by the said Pierre was contrary to the laws of the United States of America, to the law of Nations and to the express Provisions of the Treaties at this time subsisting between the Republic of France and the King of Sweden— In as much then as the capture and detention of the said Sloop *Betsy* and her cargo are manifestly unjust and contrary to the laws of the United States, to the laws of Nations and to the Treaties now subsisting between the Republic of France and the King of Sweden— Your Libellants pray that the said *Betsy*, her cargo, Tackle, apparel and furniture and all other things to her belonging, may, by the Decree of this Court, be restored to your Libellants and that full satisfaction may be made by the said Pierre Arcade Johanne and all others concerned for the unlawful Capture and detention of the said Sloop and cargo and all damages and expenses incurred thereby. For which end your Libellants humbly pray process of attachment and monition as in like cases is customary.

ROBT. SMITH,  
Proctr. for Libellants.

• • •



ALEXANDER S. GLASS and OTHERS

VS.

THE SLOOP "BETSY" and CARGO  
and PETER ARCADE JOHANNE.

In the Admiralty Court of the United States for the District of Maryland.

And the said Peter Arcade Johanne saith this Court jurisdiction of the Libel aforesaid and the matter therein set forth ought not to have, because by Protestation not confessing or acknowledging any of the matters and things in and by the said Libel set forth to be true for plea to the said Libel the said Peter Arcade Johanne saith that on or about the first day of February in the year of our Lord One thousand seven hundred and ninety-three the National Convention of France decreed in the name of the French Nation that the French Republic is at war with the King of England, and the said Peter Arcade Johanne further saith that after the first day of February in the year of our Lord seventeen hundred and ninety-three actual war took place and open hostilities were carried on between the Republic of France and the King of Great Britain and that the said Nations of France and of Great Britain ever since were and now are in a state of actual war and open hostilities and the said Peter Arcade Johanne further saith that after to wit on the ——— April in the year seventeen hundred and ninety-three he, the said Peter Arcade Johanne, being a citizen of the Republic of France was duly commissioned by the said Republic as Captain of a certain armed Schooner called *Citizen Genet*, which said armed schooner was fitted out by, and belongs to citizens of the said Republic of France and the said Peter Arcade

Johanne further saith, that by his said Commission he was authorized to command the said Schooner and therewith and by force of arms to apprehend, seize and take all ships and vessels, good wares, merchandise, and effects belonging to the enemies of the said Republic—and the said Johanne further saith that in virtue of the said Commission, he the said Peter Arcade Johanne with his officers, seamen and mariners on board the said armed Schooner called the *Citizen Genet* on the fourth day of July in the year of our Lord Seventeen hundred and ninety-three on the Atlantic Ocean and about fifteen miles from any part of the sea coast of the United States and about that distance from any of the Islands of the said United States seized and took as Prize the said Sloop called the *Betsy*, with the cargo then on board, the said Sloop and cargo being at the time of the said Capture the property of some Subject or Subjects of the King of Great Britain, the said King of Great Britain and his subjects at the time of the Capture and long before being at actual war and open hostilities with the French Republic, as to the said Johanne it was lawful by the law usage and practice of nations and the laws of the said Republic and also by virtue of his said Commission from the said Republic—and the said Peter Arcade Johanne further saith that by a Treaty of Amity and Commerce, made between the United States and the late King of France concluded and signed at Paris on the sixth day of February in the year of our Lord One Thousand seven hundred and seventy-eight by Plenipotentiaries of the said King and the said United States duly and respectively authorized for that purpose, it was among other things agreed and established as follows, that is to say, "That it shall be lawful for the ships at war of either party and privateers freely to carry whither so ever they please *they* ship and goods taken from their enemies, without being obliged to pay any duty to the officers of the Admiralty or any other Judges, nor shall such prizes be arrested and seized

when then they come to and enter the ports of either party, nor shall the searchers or other officers of those places search the same or make examination concerning the lawfulness of such prizes, but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions which the commanders of such ships of war shall be obliged to shew." And the said Peter Arcade Johanne further saith that Peace and Friendship hath subsisted since the year seventeen hundred and seventy-eight and still subsists between the Government of the United States and the Government of France and between the citizens of France and the citizens of the United States and in consequence of the said peace and friendship and the stipulation aforesaid in the said treaty, the said Johanne brought the said Sloop and cargo as Prize into the Port of Baltimore and the said Peter Arcade Johanne further saith that the said Prize ought not to be arrested or seized or the lawfulness of the said prize inquired into by the United States or any of its Courts of Justice or Officers of the said United States—and the said Peter Arcade Johanne further saith, that by the law of Nations when two nations are at war they have a Right to make Prizes of the ships and vessels, goods, wares and merchandise and effects of each other found and taken on the high seas and that whatsoever is the Property of an enemy may be acquired by capture at sea—

. . .

For all which causes the said Johanne doth humbly demand the judgment of this Honorable Court whether he shall be compelled to make answer unto the said Libel and whether this Court will cognisance or jurisdiction of the Libel aforesaid and the matter therein contained respecting the said Sloop and her cargo so taken and condemned as aforesaid as lawful prize— And the said Johanne also humbly prays that the said Sloop and cargo maybe discharged from arrest and be delivered up to him and that he maybe hence dismissed with costs and

damages by him in this behalf most wrongfully sustained.

JAMES WINCHESTER,  
Proctor for the Captors.

And now here also cometh the Libellants by Robert Smith their Proctor and file here the following Replication, to wit—

These Repliants protesting that this Court hath jurisdiction of the Libel aforesaid and of the matter therein set forth and having to themselves all and all manner of advantages of exception to the manifold Insufficiencies of the said Plea—for Replication thereunto say, that the said Plea of the Defendant and the facts and allegations therein contained are untrue, all of which matters and things there Repliants pray may be enquired of as this Honorable Court shall award and humbly pray, etc.

ROBT. SMITH,  
for the Libellants.

And because the Judge now here is not yet advised of his Judgment to be rendered of and concerning the premises Day therefore is given to the parties aforesaid here until the fifteenth day of August Instant to hear his Judgment of and concerning the Premises because the said Judge now here is not yet advised—

And now here at the Day, to wit the said fifteenth day of August, seventeen hundred and ninety-three cometh the Parties aforesaid— Whereupon all and singular the matters and things being considered and understood upon the proof made in the said cause, did order and adjudge that the Plea aforesaid to the jurisdiction of this Court be allowed and held good for the first cause stated in the Plea and that the Libel aforesaid be dismissed with Costs to the said Defendant, and it is further ordered by the Court that the said Sloop and Cargo be discharged from arrest and restored to the said Defendants— Whereupon the said Libellants now here pray an Appeal—

GLASS AND OTHERS

vs.

The Sloop "BETSY" & CARGO  
and CAPTN. JOHANNENE.

Appeal to the Circuit Court of the United States for the Maryland District. Novr. Term, 1793.

It is admitted by the Appellants and agreed that this admission shall be received as evidence, on the hearing of the said appeal, that war exists between Great Britain and France as stated in the plea; That the said Johannene is a citizen of France, and was commissioned as a Captain of the said armed Schooner called the *Citizen Genet* and that the Capture of the Sloop and Cargo aforesaid was made on the day, at the place and in the manner stated in the Plea of the Captors and brought as Prize into the Port of Baltimore— But the said Appellants do not admit that the said Sloop and cargo was the property of British Subjects.

ROBT. SMITH,

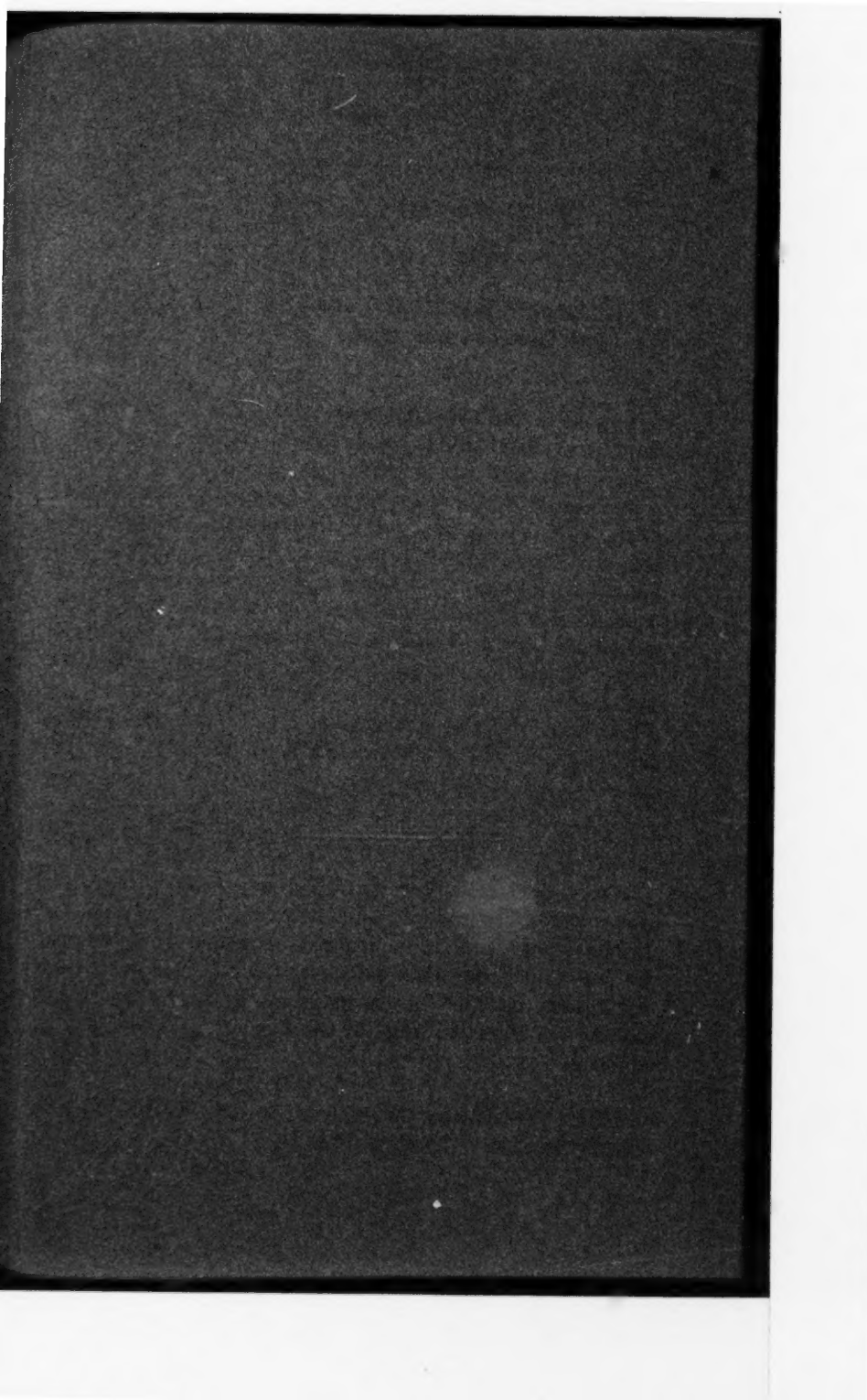
Proctor for Appellants.

And now here before the Judge aforesaid on the Day and year aforesaid all and singular the matters and things being seen, It is ordered adjudged and Decreed by the Court that the said Appeal be dismissed with costs, and that the Decree made in the said case by his Honor the District Judge of the District of Maryland be affirmed.

. . . .

[This decree was thereafter reversed by the United States Supreme Court, 3 Dall., 6.]





(25,552)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 722.

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HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE  
SHIP "APPAM," AND L. M. VON SCHILLING, VICE  
CONSUL OF THE GERMAN EMPIRE, APPELLANTS,

vs.

HENRY G. HARRISON, MASTER OF THE STEAMSHIP  
"APPAM."

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF VIRGINIA.

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a *Transcript of Record.*

HANS BERG, Prize Master in Charge of the Prize Ship "Appam,"  
and L. M. Von Schilling, Vice-Consul of the German Empire,  
Appellants,

versus

HENRY G. HARRISON, as Master of the Steamship "Appam,"  
Appellee.

Appeal from the District Court of the United States for the Eastern  
District of Virginia, at Norfolk, Virginia.

Proctors of Record.

Messrs. Frederick W. Lehmann, of St. Louis, Mo.; John W. Clifton, Norvin R. Lindheim and Walter S. Penfield, of Washington, D. C.

Messrs. Hughes, Little & Seawell (Mr. Robert M. Hughes), of Norfolk, Virginia, Proctors for appellants.

Messrs. Barry, Wainwright, Thacher & Symmers (Mr. J. K. Symmers), of New York City.

Messrs. Hughes & Vandeventer (Mr. Floyd Hughes), of Norfolk, Virginia, Proctors for appellee.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,  
*Eastern District of Virginia, ss:*

At a District Court of the United States for the Eastern District of Virginia, begun and held at the United States court room in the Court House and Post Office Building in the City of Norfolk, Virginia, on the first Monday in the month of May, being the first day of the same month, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

No. 2093. In Admiralty.

HENRY G. HARRISON, Master,  
VERSUS  
CARGO OF THE STEAMSHIP "APPAM."

2

*Libel.*

Filed March 13th, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

The libel of Henry G. Harrison as master of the steamship "Appam" against the cargo laden on board said steamship and against all persons lawfully intervening for their interests in said cargo, in a cause of possession, civil, tort and maritime, alleges as follows:

First. That at all the times hereinafter mentioned libelant was and still is the master of the steamer "Appam" now lying in Hampton Roads, and at all times hereinafter mentioned had possession of said vessel and of her cargo as such master.

Second. Said cargo is wrongfully withheld from the libelant and from the true and lawful owners thereof by one Hans Berg and other persons unknown to the libelant.

Third. Said steamship "Appam" sailed from Dakar, Africa, on or about January 11, 1916, bound for Liverpool, England. On or about the 16th day of January, 1916, she was seized by certain persons unknown to the libelant, and thereafter under compulsion was forced to proceed with her passengers, crew and cargo to Hampton Roads, where she arrived on the 1st day of February, 1916, since which time she has been either at Hampton Roads or Newport News, Virginia, in this District.

3 Fourth. On information and belief, libelant alleges that the said steamer "Appam," being a British vessel, was seized on the high seas on or about January 16, 1916, by a German vessel called the "Mowe" and was placed by the commander of said captor vessel in charge of one Hans Berg and others, and under compulsion was by them forced to proceed as aforesaid, and has been and is now held by the said Hans Berg and other persons placed on board from the "Mowe" as an alleged prize of war belonging to and the property of the German Empire.

Fifth. Upon information and belief, that the Prize Code of the German Empire in effect since 1909 provides as follows:

"111. The commander provides for bringing the vessel into a German port or the port of an ally with all possible dispatch and safety.

A prize may be brought into a neutral port only if the neutral power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or



lack of fuel or supplies. In the latter cases she must leave as soon as the cause justifying her entrance ceases to exist."

Sixth. That the steamship "Appam" with her cargo arrived at Hampton Roads on the 1st day of February, 1916, in a seaworthy condition. That since that time she has been removed to the port of Newport News, where she is now lying at anchor in the custody of this court under and in accordance with process issued by this court as prayed for in a libel filed by the British & African Steam Navigation Co. Ltd. against said vessel in a suit for possession thereof; that according to the law of Nations and the laws of the United States

the cargo of said steamship "Appam" has been and is unlawfully held and detained at Newport News; and that by holding and detaining the said cargo at Newport News, the said Hans Berg and others above referred to as assisting him have violated the law of Nations and the laws of the United States and the neutrality of the United States; and that according to the law of Nations and the laws of the United States the libelant is entitled to possession of the cargo laden on board said steamship as aforesaid.

Seventh. Libelant further alleges, upon information and belief, that prior to the arrival of said steamship "Appam" and her cargo at Hampton Roads and in the port of Newport News, and since the said arrival the said Hans Berg and the other persons above mentioned as assisting him, or other persons unknown to libelant, have removed or caused to be removed portions of the cargo of the said steamship in violation of the law of Nations and the laws of the United States and in violation of the neutrality of the United States.

Eighth. Upon information and belief, the said cargo was and is of very great value and a large portion thereof by reason of its nature and character is subject to deterioration and at least partial destruction, and will deteriorate and be to considerable extent destroyed in value unless possession thereof be promptly given to libelant for carriage to destination or for such treatment as will prevent its further deterioration and loss of condition and value.

Ninth. All and singular the premises are true and within the jurisdiction of the United States and of this Honorable Court.

Wherefore the libelant prays that process in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the cargo laden on board said steamship "Appam," and that Hans Berg and any and all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid; that the said cargo may be delivered to the libelant, and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

BARRY, WAINWRIGHT, THACHER &  
SYMMERS,

HUGHES & VANDEVENTER,

*Proctors for Libelant.*

FLOYD HUGHES,  
JAMES K. SYMMERS,

*Advocates.*

STATE OF NEW YORK,  
County of New York:

Henry G. Harrison, being duly sworn, says that he is the libelant above named; that he has read the foregoing libel, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

(Signed)

HENRY GEORGE HARRISON.

Sworn to before me this 11th day of March, 1916.

[SEAL.]

GEORGE A. CONROY,  
Notary Public, Queen's County.

Certificate filed New York Co. #149.

*Protest of Lieutenant Hans Berg.*

Filed March 17th, 1916.

March 15, 1916.

Mr. John G. Saunders, United States Marshal, Norfolk, Virginia.

DEAR SIR: In relation to the process served on me on board the Appam Tuesday, March 14th, 1916, I feel it my duty again to protest respectfully (as I have already done verbally) against any service of process or interference with my full control of the same as Lieutenant Commander on behalf of the Government of the German Empire.

Yours truly,

BERG,  
Lt. r. r. r. Rmdt. r. Appam.

*Marshal's Report of Receipt of Communication from Lieutenant Berg.*

Filed March 17th, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

I respectfully beg leave to report to your Honor, that I have this day received the attached communication from Lieutenant Berg in relation to the process served on him on board the s. s. Appam Tuesday, March 14th, 1916, in this cause issued, which speaks for itself.

Respectfully submitted,

JOHN G. SAUNDERS,  
United States Marshal.

Richmond, Va., March 17th, 1916.

7 *Claim of Hans Berg, Prize Master, and L. M. von Schilling,  
Vice-Consul of the German Empire.*

Filed March 31st, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the Court aforesaid:

**Claim.**

Hans Berg, Master in charge of the Prize Ship "Appam" and L. M. von Schilling, Vice-Consul of the German Empire for the District comprising Newport News, Norfolk and Portsmouth, and all waters contiguous thereto, hereby claim the cargo of the Steamship "Appam" proceeded against in this cause and aver that it is the property of the German Empire and that no other person is the owner thereof and they further severally aver that they are duly authorized hereto by said owner and that the said Hans Berg is Master of the Prize Ship "Appam" and as such is bailee of the said cargo for the said owner.

HANS BERG, *Prize Master.*  
L. M. VON SCHILLING,  
*Vice-Consul of the German Empire.*

STATE OF VIRGINIA,  
*Corporation of the City of Norfolk, to-wit:*

Now this 31st day of March in the year 1916, personally appeared before me Hans Berg, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,  
*Notary Public.*

STATE OF VIRGINIA,  
*Corporation of the City of Norfolk, to-wit:*

Now this 31st day of March in the year 1916 personally appeared before me L. M. von Schilling, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,  
*Notary Public.*

8 *Exceptions, Plea, and Answer.*

Filed March 31st, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the Court aforesaid:

The exceptions, plea and answer of Hans Berg, Prize Master in charge of the prize ship Appam, and L. M. von Schilling, Vice-Consul of the German Empire for the District comprising Newport News, Norfolk and Portsmouth, and all waters contiguous thereto,

to the libel in this cause. These respondents except to the said libel on the following grounds:

First. It appears therefrom that the duties of the libellant as Master were suspended and nullified by the capture of said steamship "Appam," as lawful prize of war, and that since then he has not had such possession as bailee as would entitle him to libel for the cargo mentioned in his libel.

Second. That admitting, for the purpose of this exception only, that the allegations of the said libel are true, there are no facts set out which show any violation of the neutrality of the United States.

Third. That even if the said allegations can be considered  
9 as showing any violation of such neutrality, it was not such a violation as is a matter for the court and not such as would give any ground for restoring the possession of the said cargo of the said steamer "Appam" to the libellant herein.

Fourth. That it sufficiently appears from the allegations of said libel that the said steamer "Appam" and her cargo were and are lawful prize of war belonging to and the property of the said German Empire and that by the Law of Nations the title of the said German Empire to the said prize cannot be inquired into in these proceedings, and, that by the treaties now in force between the German Empire and the United States of America and, also, by the Law of Nations the said prize was entitled to enter the harbor of Newport News and is exempt from any legal process of arrest, search, or otherwise, in the premises, and that this court is without jurisdiction of the alleged cause of action purporting to be set forth in said libel.

And by way of answer to said libel, without waiving any of the said exceptions, these respondents say as follows:

First. The respondents deny the allegations in the first article of the libel as to any transactions after January 16th, 1916.

Second. They deny the statements contained in the second article of said libel.

Third. These respondents have no knowledge when nor whence said steamship sailed, and therefore neither admit nor deny the same but call for strict proof thereof. They deny that on or about the 16th day of January, 1916, or at any time thereafter she was unlawfully seized by certain persons unknown to the libellant, though they admit that she was brought into Hampton Roads under the circumstances hereafter described, and that she is now at the  
port of Newport News, Virginia.

10 Fourth. These respondents admit the allegations of the fourth paragraph of the libel, except that they aver that the respondent Hans Berg was in charge of the navigation of the said steamer, after her capture and while she was being brought into port and they further aver that she is an actual prize of war, belonging to and the property of the German Empire.

Fifth. These respondents deny that the German Prize Code is correctly quoted in the libel and call for strict proof thereof, if material.

Sixth. It is true that the Steamship "Appam" arrived at Hampton

Roads on the first day of February, 1916. At the time she was not in a seaworthy condition. She was manned by a prize crew of only twenty-two men, and she had on board the crew and passengers of the captured steamer as prisoners, who aggregated about four hundred persons. Of these the crew alone consisted of about one hundred and sixty, she being a very large steamer and requiring a very large crew to handle her. She was short of water, provisions and fuel, and was necessarily obliged to come into a harbor as a matter of necessity and humanity. Her machinery also needed overhauling. It is true that she was afterwards removed to the port of Newport News when pratique was granted and official visits made. It does not appear that according to the Law of Nations and the laws of the United States they have not been and are not entitled to hold and detain the said steamer at Newport News. The prize master brought her into Newport News in good faith, relying upon the treaty between the United States of America and the German Empire, which provides as follows:

11 "The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs or any others: nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. (But conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger or accident of the sea, they shall be obliged to depart as soon as possible.)"

This is an old treaty and was originally both in French and English. The French form of the same is as follows:

"Les vaisseaux de guerre publics et particuliers des deux Parties Contractantes pourront conduire en toute liberte, partout ou il leur plaira, les vaisseaux et effets qu'ils auront pris sur leurs ennemis, sans etre obligees de payer aucuns impots, charges ou droits aux Officiers de l'Amirauté, des Douanes ou autres. Ces prises ne pourront etre non plus ni arretees, ni visitees, ni soumises a des procedures legales, en entrant dans le port de l'autre partie, mais elles pourront en sortir librement, et etre conduites en tout temps par le vaisseau preneur aux endroits portes pas les commissions, dont l'officier Commandant le dit vaisseau sera oblige de faire montre.

(Mais, conformement aux Traites subsistans entre les Etats-Unis et la Grande Bretagne, tout vaisseau qui aura fait une prise sur des sujets de cette derniere Puissance, ne saurait obtenir un droit d'asile dans les ports des Etats-Unis: et s'il est force d'y relacher par des tempets ou quelque autre danger, au accident de mer, il sera oblige d'en repartir le plutet possible.)"

12 (The parts in parenthesis lapsed and were not revived by the existing treaty of 1828, and are no longer in force.)



These respondents aver also that by the general principles of international law the prize master was entitled to bring his ship into this neutral port under the circumstances above set forth, and that the length of his stay herein is not a matter for determination in a judicial tribunal of the United States.

Seventh. The respondents deny the averments of the seventh article of the said libel.

Eighth. These respondents, while believing that some of the cargo may be subject to deterioration, deny the right of the libellant to claim it now or at any future time.

Ninth. These respondents deny the ninth article of the libel.

And further answering these respondents state that the steamer "Appam" while a British vessel was captured on the high seas on January 15th, 1916, during the existence of a state of war between Great Britain and the German Empire, by the Mowe, a man-of-war of the German Empire, and became a lawful prize of war of said Empire, and was placed by the commander of said captor vessel in charge of Hans Berg, a lieutenant in the naval force of said German Empire, and a prize crew composed of men in the naval service of said Empire, and was brought into the port of Newport News Virginia, and is now held by the said Hans Berg and his said prize crew as a lawful prize of war belonging to and the property of the said German Empire.

13 Further answering these respondents say that proceedings have been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the said steamer Appam and her cargo as prize of war, and that such proceedings are now pending. Said proceedings are being pressed with all the speed possible under the rules of procedure that there prevail, and these respondents respectfully pray this court to suspend all further proceedings until the said prize proceedings are brought to an end, and proper evidence thereof is laid before this court.

And these respondents respectfully represent that this court ought not to take jurisdiction in this cause and they pray that the libel be dismissed.

HANS BERG, *Prize Master.*

L. M. VON SCHILLING,

*Vice-Consul of the German Empire.*

JOHN W. CLIFTON,  
HUGHES, LITTLE & SEAWELL,  
NORVIN R. LINDHEIM,  
WALTER S. PENFIELD,

*Proctors for Respondent.*

14 STATE OF VIRGINIA,

*Corporation of the City of Norfolk, to-wit:*

Now this 31st day of March in the year 1916 personally appeared before me Hans Berg, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,  
*Notary Public.*

## STATE OF VIRGINIA,

*Corporation of the City of Norfolk, to-wit:*

Now this 31st day of March in the year 1916 personally appeared before me L. M. von Schilling, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,  
Notary Public.

- 15 *Interrogatories Filed by the Libellant and Propounded to Hans Berg "Prize Master" and L. M. von Schilling, Vice-Consul of the German Empire, They Having Made Claim and Filed Answer in These Proceedings on March 31, 1916; said Interrogatories to be Separately and Individually Answered by said Hans Berg "Prize Master" and said L. M. von Schilling, Vice-Consul as Aforesaid.*

As Allowed by the Court.

Filed April 8th, 1916.

First interrogatory; Omitted.

Second interrogatory. (a) State the position by latitude and longitude of the steamship Appam when she was captured.

(b) State the day and hour when she was captured.

(c), (d) and (e) omitted; the following allowed in lieu thereof:

State what amount of coal and supplies were consumed on the Steamship Appam from time of capture until arrival at Hampton Roads and what amounts, if any, were taken aboard during that period.

(f) State in detail what part of, and in what respect the Appam's machinery needed overhauling.

(g) State in detail in what respect the Appam was unseaworthy at the time of her arrival at Hampton Roads on February 1st, 1916.

(h) Was any request made to the United States Government authorities or Port authorities or other authorities for permission to make repairs or have the Appam surveyed preliminary to making repairs, or was any attempt made to make repairs or any steps taken looking to the making of repairs?

(i) If so, set forth the same in detail.

(j) State whether Henry G. Harrison was the master of the Appam at the time she was captured and in possession thereof.

Third interrogatory: (a) State in detail what papers were removed from the Appam after her capture.

(b) Did you remove the registry of the Appam?

(c) State what property was removed from the Appam?

(d) State whether the articles mentioned in the list annexed hereto and marked "Schedule A" were not removed from the vessel?

(e) If you state they were, state when, by whom and to what place?

(f) Did you sell any portion of the cargo or provisions?

(g) If you did, state to whom, and what you did receive for the same?

Fourth interrogatory: Omitted.

Fifth interrogatory: (a) On the arrival of the Appam at Hampton Roads did you deliver any papers *and* or documents to any one?

(b) If so, when and to whom?

17 (c) Describe in detail the papers *and* or documents you delivered.

(d) When and where have prize proceedings, if any, been instituted in the Empire of Germany.

(e) If you State Prize Proceedings have been instituted in Germany, state what is the present status of such proceedings.

HUGHES & VANDEVENTER,  
*Of Counsel.*

18

"SCHEDULE A."

(x.013.)

Elder Dempster and Co., Limited.

19

Received from the purser on board the vessel's cash a/c showing a balance of £344. 18. 1. also contents of Till as under

Cheque to Order of Elder Dempster & Co.....	£218. 0.11
Four x £ 5 notes.....	20.
Fourteen x £1 .....	14.
Eighty seven x 10/.....	43. 10
Silver .....	26. 15
Marks 29 .....	1. 9
Health Insurance Stamps.....	0. 16
Postage Vouchers .....	13. 5
Receipt from crew for cash.....	2. 15
Cheques to order of Lieut. Berg.....	5. 10. 11
Cash M. F. S. James.....	11. 7. 10
	<hr/>
	£344. 18. 1

19

*Answer- to Interrogatories.*

Filed April 18th, 1916.

Answers by Hans Berg.

First interrogatory: Omitted.

(33.05)

Second interrogatory: (a) Latitude 35.05' N. longitude 14' 20' W. as far as I can remember.

(b) January 15, 1916. I do not know the exact hour, but somewhere between 12 Noon and 2 P. M.

(c), (d) and (e): When the "Appam" arrived we had only about 50 tons of coal left. Her provisions were practically exhausted. No supplies of any sort were taken on from the time of the capture 'till arrival. The exact amount consumed in that period would be ascertained by deducting the amount used up to the time of the capture from the total amount taken on at the beginning of the voyage, which information is at the disposal of libellant.

(f) I do not profess to be familiar with the machinery of the "Appam," she being a large vessel and my navigation of her being only for a short period with a small crew. I understood, however, that her engines and boilers needed overhauling, and there may be other particulars also in which she needed overhauling.

20 (g) The "Appam" on arrival was unseaworthy, first, because of her small crew; second, because her fuel and engine oil were about exhausted; third, because her water and provisions were exhausted; fourth, because of the overhauling above mentioned; fifth, there may have been other matters unknown to me.

(h) The only thing done by me was a verbal report to the Collector of Customs that some repairs were necessary, no repairs made except by my own crew (still incomplete) on most necessary work.

(i) Answered above.

(j) I do not know whether Henry G. Harrison was Master of the "Appam" at the time she was captured and in possession thereof or not. I did not go aboard the "Appam" until the day after she was captured, and had no personal knowledge of anything that occurred aboard of her before that time. I only know he claims to be Master.

#### Answer to 3rd Interrogatory.

(a) As I did not go aboard the "Appam" until the day after her capture, and was not in command of the captor vessel, I do not know personally what papers were removed, though I do not deny that they were.

(b) I did not.

(c) For reasons given above, I do not know personally what property was moved from the "Appam."

(d) The aggregate named in Schedule "A" is correct and still aboard.

21 (e) Answered above.

(f) The only articles sold were from the bar. On the voyage I permitted the steward to run the bar, requiring him to account to me for the amount sold.

(g) The total proceeds of such sales were about £300 cash and checks.

I answered questions d, e, f and g denying that same are material to the issues in this cause or that same are covered by the libel in this cause.

Answer to Fourth Interrogatory: Omitted.

#### Answer to Fifth Interrogatory.

(a) I gave to Mr. Hamilton, the Collector of Customs, a copy of

my authority from the Commander of the Möwe, which is in the following words:

Ausweis.

für die amerikanischen Behörden.

Vorseizer dioses, der Leunant zur Sec. d. Res. Berg, ist von mir zum Kommandanten des aufgebrachten englischen Dampfers "Appam" ornannt worden und hat Befehl, das Schiff in den nächsten amerikanischen Hafen zu bringen, und dert aufzulegen.

Zommando S. M. H. Möwe

Graf zu Dohna

Korvetten—Kapitän und Kommandant.

Kaiserliche Marine

Beiefstempeel

Kommando S. M. H. Möwe.

I also sent a copy to the Embassy.

(b) Answered above.

(c) Answered above as far as I can recollect. There have been so many transactions and transformations since my arrival that  
22 it is possible I may have omitted something, though I do not think so.

(d) I am officially informed by the message communicated to me from the German Embassy that prize proceedings were instituted in Germany on February 11, 1916, and that they are still pending.

(e) I have no information as to their present status.

*Answers by L. M. von Schilling.*

As I was not aboard the "Appam" and knew nothing about the transaction until after her arrival I cannot answer from any personal knowledge.

Answer to First Interrogatory. Omitted.

Answer to Second Interrogatory.

I decline to answer because I have no personal knowledge of any facts bearing on the question therein set forth.

Answer to Third Interrogatory.

I cannot answer for the same reason.

Answer to Fourth Interrogatory.

I decline to answer for reasons given.



23

## Answer to Fifth Interrogatory.

I cannot answer for want of knowledge.

(Signed)

H. BERG.

(Signed)

L. M. VON SCHILLING.

Subscribed and sworn to before me this 18th day of April, A. D. 1916.

(Signed)

M. C. COPELAND,

*Notary Public.*

24

*Affidavit of Hans Berg.*

Filed May 12th, 1916.

This day personally appeared Lieutenant Hans Berg and made affidavit as follows:

I have been officially furnished with a copy of the cablegrams sent by the German Embassy through the State Department to Germany, and a copy of the replies from Germany, and I attach the same to this affidavit marked "Exhibits 1 and 2." I have not secured all the necessary papers by the date set for this hearing, and I lack the following evidence.

A copy of the decision of the prize court.

I also state that I was not upon the Appam until the day after her capture and that I have no personal knowledge of anything that occurred aboard of her until I went aboard except what I could see from the Möwe; that the evidence of Count Dohna, the Commander of the Möwe, who knows what transpired during that time, what papers, if any, were removed and what else, if anything, was removed, is material, and I respectfully represent that it is necessary in order to properly prepare my defense that a commission issue in order to take his testimony: also to take the testimony of First Lieutenant Pohlmann, First Lieutenant Kuhl and others, who were sent in the small ship's boat to board the Appam at the time and know what transpired, the boat being in charge of First Lieutenant Pohlmann; and none of them being now with me.

HANS BERG.

25

Subscribed and sworn to before me this 12th day of May, 1916.

M. C. COPELAND,

*Notary Public.*

Filed May 12th, 1916.

DISTRICT OF COLUMBIA,

*City of Washington:*

I, Prince Von Hatzfeldt-Trachenberg, Counsellor of the Imperial Germany Embassy, Washington, D. C., being duly sworn, do depose and say as follows:

The official records of the Embassy show that, in order to facilitate the preparation and to expedite the trial of the Appam case, the German Embassy transmitted and received, relating thereto, the following Radio-grams:

Sent—1.

March 6, 1916.

Have Prize-Court immediately act on Appam case and send certified copies of the judgment of the prize-court. Also send certified copies of the commission of the commander of the Moewe and commission of Lieutenant Berg as an officer in the German Navy. Also send a certified copy of the commission of the Moewe itself as an auxiliary cruiser and other data required under the rules of International Law.

(Signed)

COUNT BERNSTORFF.

(Sent) #2.

March 14, 1916.

Please wire date on which papers are sent. Please hurry proceeding against ship in prize-court and wire judgment.

(Signed)

COUNT BERNSTORFF.

27

(Sent) #3.

March 21, 1916.

Hasten certified copies decision of prize-court in ship proceedings if possible before conclusion of cargo proceedings. Send certificate showing the date beginning preliminary proceedings of the prize-court in the Appam case. The libel was filed here February 16th. Court has set April 18th for trial.

(Signed)

COUNT BERNSTORFF.

(Received) #1.

BERLIN, March 19, 1916—(arrived March 21st).

(1.) The decision of the prize-court Hamburg in re Appam will be hurried as much as possible.

(2.) The papers concerning the commission of the Moewe, the commission of the commander of the Moewe, the commission of

Lieutenant Berg, extracts from naval officers' list and list of men of war will follow instantly. Please inform American court about impending arrival.

(Signed)

FOREIGN ZIMMERMANN.

2 2

(Received) #2.

BERLIN, April 3, 1916—(arrived April 5th).

(1.) The certificate that proceedings before the prize-court is pending since February 11th is on way.

(2.) All other desired documents are equally en route.

(3.) Proceedings of the German prize-court in re Appam are being expedited as much as possible, the condemnation of the ship is, however, impossible before beginning of May owing to the delays prescribed by the law.

(4.) The judgment will be transmitted immediately after the delivery.

(Signed) FOREIGN JAGOW.

(Signed) PRINZ v. HATSFELDT-TRACHENBERG.

(Copy of certificates of authentication waived.)

EXHIBIT NO. 2 WITH AFFIDAVIT OF HANS BERG.

Filed May 12th, 1916.

BERLIN, March 19, 1916—(arrived March 21st).

(1.) The decision of the prize-court Hamburg in re Appam will be hurried as much as possible.

(2.) The papers concerning the commission of the Moewe, the commission of the commander of the Moewe, the commission of Lieutenant Berg, extracts from naval officers' list and of list of men of war will follow instantly. Please inform American court about impending arrival.

(Signed)

FOREIGN ZIMMERMANN.

BERLIN, April 3, 1916—(arrived April 5th).

(1.) The certificate that proceedings before the prize court is pending since February 11th is on way.

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(3.) Proceedings of the German prize court in re Appam are being expedited as much as possible, the condemnation of the ship is, however, impossible before beginning of May owing to the delays prescribed by law.

(4.) The judgment will be transmitted immediately after the delivery.

(Signed)

FOREIGN JAGOW.

(Copy of certificates of authentication waived.)

*Opinion of District Judge Waddill.*

Filed July 29th, 1916.

**Libels to Recover Possession of the Steamship "Appam" and of Her Cargo.**

Messrs. Frederic R. Coudert, James K. Symmers, Howard Thayer Kingsbury and Ralph James M. Bullowa, all of New York City, and Hughes & Vandeventer, of Norfolk, Va., for libellants; Messrs. John W. Clifton, of Washington, D. C., Norvin R. Lindheim and Walter S. Penfield, of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for respondents.

31 These are suits in admiralty, brought respectively by the owner and master, to recover possession of the British steamship "Appam," now lying at Newport News, Virginia, and her cargo. On the 15th of January, 1916, about three o'clock in the afternoon, during the existence of a state of war between the Empires of Great Britain and Germany, the steamship Appam was captured on the high seas by the German cruiser "Moewe," in latitude 33.19 N. longitude 14.24 W.

The Appam, flying the British flag, and registered as an English vessel, is a modern passenger and cargo steamship, 440 feet long, 58 feet broad, 35 feet deep, and 7,800 tons gross burden, built in Belfast, Ireland, in February, 1913, since which time she has been engaged in commerce, with the exception of a short period about a year prior to her capture, as hereinafter shown, when she was used as a transport for troops. She had made twelve voyages to, and was on the return trip of her thirteenth voyage from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernals, tin, maize, sixteen boxes of specie, and other articles. At the West African port, she took on one hundred and seventy passengers, of whom twenty two were Germans, nineteen men and three women, eight of them being military prisoners of the English government. She had a crew of about one hundred and sixty all told, and carried a three pounder gun on her stern.

The Moewe, flying the German ensign, approached the Appam on her starboard side, and when about one hundred yards away, fired a gun across the bow of the latter as a signal to stop, which she did, and she was boarded, without resistance, by an armed crew from

32 the Moewe, who brought with them several buckets with peculiar looking things in them, some round, two bombs were slung, one over the bow, and one over the stern of the Appam. An officer from the Moewe said to the captain of the Appam that he was sorry, but he had to take his ship, and asked him how many passengers he had, and what cargo; whether he had any specie, and how much coal. When the shot was fired by the Moewe, the captain of the Appam instructed his wireless operator not to touch the wireless instrument, and his officers "on no account to let any one touch

that gun we have on board." The officers and crew of the Appam, with the exception of the engine room force, thirty-five in number, and the second officer, were then ordered on board the Moewe, where the captain was told by the officer commanding that vessel: "You are a very lucky man; I would have fired at you if you had attempted to escape; I would have sunk you." The captain, officers and crew of the Appam were then sent below, between decks, down in the hold, where they were kept until the evening of the seventeenth of January, when they and also about one hundred and fifty persons, officers and crews of five or six vessels previously sunk by the Moewe, were ordered back to the Appam, and kept on board as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the Appam, that he was now a member of the German Navy; to which the chief replied that he did not think he was; and the senior officer said "This is no laughing matter, and if you do not obey my orders, I will blow your brains out, but if you obey me, not a hair of your head will be touched." He also told him to tell his staff the same thing, and if they did not obey his orders, to bring them to him, and they would be shot. He thereupon enquired as to the quantity of coal on hand, the various

33 revolutions of the engines; also the coal consumption for different speeds; and directed that steam be kept up handy, and about six o'clock in the evening, the engineer was directed to set the engines at the revolutions required, and they got under way. The German officer told the chief engineer to report to him at eight o'clock the next morning, the tonnage of coal and stores that he had, which he did. On reporting on the second morning, Mr. Berg was for the first time, seen by the engineer, and he was told that he (Berg) was now in charge of the ship, and asked him for the same information as to fuel consumption and revolutions which he had given to the former officer; and also said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did do so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor was stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who relieved each other, and were constantly in the engine room, but did not interfere with the working of the engines. Lieutenant Berg gave directions as to working the engines, and was the only officer on board who wore uniform. On the night of the capture, January 15th, the specie in the specie room was taken by the boarding party and lowered into a boat, and then taken on board the raider. After Lieutenant Berg was put in charge of the Appam, and the officers and men were ordered back on board of her; bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosives, was placed on the bridge, and several smaller ones in the chart

room. When the captain of the Appam came on board 34 from the Moewe, Lieutenant Berg pointed to a large object standing on the deck, and said to him: "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have



orders to blow up the ship instantly." He also said "There are other bombs about the ship; I do not want to use it, but I shall be compelled to if there is any trouble." During the passage, the captain of the Appam asked Lieutenant Berg, if they met an English cruiser, what would be done, and Lieutenant Berg replied that if possible he would give them ten minutes to get into the boats, but if the cruiser attempted a capture, she would be blown up. The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed, and Lieutenant Berg asked the crew of the Appam to drop the anchor, as he had not men to do it, on reaching Hampton Roads.

During the trip westward, the officers and crew of the Appam were not allowed to see the ship's compass to ascertain her course; and all lights were obscured during the voyage; no one was allowed to smoke or strike matches on deck, and the power of the navigation lights was lessened also. The German prisoners, with the exception of two who went on board the Moewe, were armed, and placed over the passengers and crew of the Appam as a guard all the way across. They wore armulets, consisting of a white band around the arm, and had rifles and revolvers, and received their orders from Lieutenant Berg.

For two days following the capture, the Appam remained in the vicinity of the Moewe, until she was started westward. Her course for the first two or three days was southwesterly varying, and afterwards westerly, and so continued until her arrival at the Virginia

35 Capes on the 31st of January. The entire engine room staff of the Appam was on duty operating the vessel across to the United States; the deck crew of the Appam kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German civilian prisoners. The night before the Appam arrived at the Capes, all of her crew were ordered below, and not allowed on deck after nine o'clock.

At the time of the capture, the Appam was approximately distant 1,590 miles from Emden, the nearest German port, and from the nearest available port, namely, Punchello, in the Maderias, 130 miles; from Liverpool, 1,450 miles, and from Hampton Roads, 3,051 miles.

The evidence shows that the Appam was in first class order, quite seaworthy, and with plenty of provisions both when captured, and at the time of her arrival in Hampton Roads.

There is no conflict in the testimony as to the facts stated, the same having been testified to by the master, first officer and chief engineer of the Appam. No witnesses were called in reply by the respondents, though Lieutenant Berg was present in court during the entire trial, and the German Crew remaining with him on the ship were within easy call of the court.

Upon her arrival at Hampton Roads, the Collector of the port was duly advised of the presence of the ship by Lieutenant Berg, and application was at once made to the Secretary of State for the vessel's internment, and also for the internment of the crew of the Appam, because of alleged resistance to capture. The right of in-

ternment of the Appam was denied, and her crew was released with their personal effects.

Subsequent to the filing of the libels, the perishable portion of the cargo of the Appam was ordered sold by the court, bringing  
36 some six hundred and thirty four thousand dollars, which fund is now in the registry of the court awaiting the court's determination of this matter.

WADDILL, *District Judge* (after stating the facts as above) :

From this brief summary of the facts, it will be seen that the question for consideration is whether the vessel and her cargo, belonging to a subject of Great Britain, captured by a cruiser of the German Empire, upon the high seas, during the existence of war between the two countries, can be brought by a prize master and crew into the waters of the United States, for the purpose of being there laid up.

The libellants earnestly urge that this can not be done, and that the coming in, as well as the insistence upon the right of asylum under the circumstances of this case, constitutes a violation of the neutrality of the United States, entitling the owners to restitution of their property; whereas, the respondents maintain the right to bring in their prize, as well as the right of asylum for the same, during pleasure, pending the continuance of the war, and insist that such right exists as well under general international law, as under treaty existing between this country and Prussia, now a part of the German empire; that the prize is the property of the German government by reason of its capture from a citizen of a belligerent country on the high seas, by one of its duly commissioned war vessels; that the title or right of possession thereto can not be enquired into by this government, or the respondents impleaded in the courts of the United States; that the court of the captor country alone can  
37 determine the validity of the seizure and title to said prize;

and that this government, under the existing treaty can not deny to the capturing country the right of asylum for said prize.

The court has been most fortunate in having the benefit of the arguments of able and accomplished counsel presenting the respective contentions; and almost every conceivable question and kindred subjects, bearing incidentally on the issues involved, have received the careful consideration of counsel, and the case has been fully, ably and completely presented and argued, which greatly lightens the burden of the court in reaching its conclusion, as well on the merits of the controversy, as in determining the crucial points involved, and eliminating those unnecessary to be passed upon.

The court will not attempt any general discussion or review of the authorities upon many of the views presented, as to do so would serve no good purpose, and unduly lengthen this opinion; but will confine itself to the consideration of the several material questions arising in the case, under its peculiar facts and circumstances. This, it will be borne in mind, is not a case of a war, public, or merchant vessel, seeking internment in the waters of the United States, nor of any such vessel coming in for temporary sojourn; nor a war vessel bringing in its prize captured at sea; nor of such war vessel sending

its prize under the convoy of a war vessel; nor a captor with its prize, forced in by reason of stress of weather, want of fuel or provisions, or for necessary repairs; but that of a vessel captured at sea, placed in charge of a prize master and 22 German sailors, who had been British prisoners on the Appam, and who, together with the Appam's crew, working under duress and threat of the loss of their lives, navigated the ship across the ocean, some fifteen hundred miles further from the scene of the capture, than to the nearest German port, into Hampton Roads, an inland water of the United States, within the jurisdiction of this court, for the purpose of indefinite asylum; the wording of the commission of the Prize Master being to "take her to the nearest American port and there to lay her up."

(Treating this case in its true light, these considerations arise, and become material, namely: (1) What are the rights existing between this country and Germany, respecting the right of entry of prizes of war captured at sea, and of asylum, in the waters of the United States, whether arising under treaty or international law. (2) Has this court jurisdiction to entertain these suits for restitution of the property in question to its owners; and (3) What is the character of the property seized, whether public or private, and can the court, as against the German government, who claims the right to adjudicate its title by its own prize court, determine the rights thereof, and afford relief as between the litigants.

### *First.*

The respondents vigorously maintained from the coming in of the prize, and the inception of this litigation, the right to bring the Appam and her cargo in for the purpose of asylum, as well under treaty with this country, as under international law, and rely especially on the treaty between the United States and Prussia of 1799, as renewed and continued in 1828, in support thereof.

Promptly after the institution of these proceedings, the German government, acting through its Ambassador at Washington, filed protests with the Secretary of State of the United States, against the prosecution of the same, and the seizure of the ship and cargo, and requested that the United States, through their proper legal department, intervene and cause the dismissal of the proceedings. Whereupon, the Attorney General, acting through the United States Attorney for this district, appeared as amicus curiæ, and brought to the attention of the court, the aforesaid position of the German government; and the same defense was in more elaborate form interposed by the German government, in the proceedings in this cause. The German Ambassador, Count J. H. von Bernstorff, stated his government's position in his communication to the Secretary of State, as shown by the following extracts therefrom:

"As the 'Appam' was captured at sea by a German man of war and brought to the Virginia port as a prize ship according to the treaty existing between our countries, you may well appreciate my surprise at the action which has been taken.

"Article XIX of the treaty of 1799 between Prussia and the United States, renewed in part by Article XII of the treaty of 1828, provides that 'the vessels and effects taken from' the enemies of the contracting parties may be carried freely wheresoever they please and that such prizes shall not be 'put under legal process, when they come to and enter the ports of the other party, etc., etc.'"

"In view of the terms of the treaty, I am at a loss to understand why such action has been taken by a court of your country. \* \* \*

"Besides the 'Appam' flies the naval flag of and belongs to the German government and therefore the possession of the captors in a neutral port is the possession of their sovereign. The sovereign whose officers have captured the vessel as a prize of war remains in possession of that vessel and has full power over her. The neutral sovereign or its court can take no cognizance of the question of prize or no prize and cannot wrest from the possession of the captor a prize of war brought into its port."

He insisted also that Article 21 of the Hague Conventions concerning the rights and duties of neutral powers in naval war, had no application, because not assented to by Great Britain. In a later communication, he further contended that his government was entitled to the rights claimed under general principles of international law, as well as under the specific terms of the treaty aforesaid.

The Secretary of State, the Honorable Robert Lansing, although he complied with the German Ambassador's request to make known his country's contention to the court, made specific reply to his communications, setting forth his interpretation of the treaty relied on, as well as his understanding of the international law involved, and the position of the government of the United States regarding both matters, and of the right of the Appam and her cargo to seek asylum in the waters of the United States. The following extracts from the letters of the Secretary of State to the German Ambassador, dated respectively March 2nd, and April 7th, 1916, show fully and clearly his conclusions and rulings in the premises. (From letter of March 2, 1916, referred to.)

"Article XIX of the Treaty of 1799, to which Your Excellency refers, reads as follows:

"The vessels of war, public and private, of both parties, shall carry (conduire) freely, wheresoever they please, the vessels and effects taken (pris) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (prises) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (conduites) out again at any time by their captors (le vaisseau preneur) to the places expressed in their commissions, which the commanding officer of such vessel (le dit vaisseau) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (vaisseau) that shall have made a prize (pris) upon British subjects shall have a right to shelter in ports of the United States, but if (il est) forced therein by tempests, or any other danger or accident of the sea, they (il cerra) shall be obliged to depart as soon as possible."

(The last provision of the above treaty, excepting Great Britain from its operation, was abrogated by the treaty of 1828.)

"This translation is taken from the published treaties of the United States, and while not conforming strictly to the original French text (a copy of which is enclosed), is sufficiently accurate for the purposes of this note. At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum for prizes brought into neutral ports by men-of-war, it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The Appam, however, as Your

42 Excellency is aware was not accompanied by a ship of war, but came into the port of Norfolk alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privilege of carrying out their prizes again 'to the places expressed in their commissions.' The Commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the Appam, the commission of Lieutenant Berg, a copy of which was given to the Collector of Customs at Norfolk, not only is a commission of a prize master, but directs him to bring the Appam to the nearest American port, and 'there to lay her up.' In the opinion of the government of the United States, therefore, the case of the Appam does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of the spoils of war in an American port. In this interpretation of the treaty, which I believe is the only one warranted by the terms of the provision and by the British treaties referred to in Article XIX, and by other contemporaneous treaties, the Government of the United States considers itself free from any obligation to accord to the Appam the privileges stipulated in Article XIX of the Treaty of 1799.

"Under this construction of the Treaty, the Appam can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of War, namely, to enter neutral ports only  
43 in case of stress of weather, want of fuel and provisions, or necessity of repairs, but to leave as soon as the cause of their entry has been removed."

(From letter of April 7th, 1916, referred to.)

"The Government of the United States agrees with the German Government's statement that the Treaty speaks of a mode of warfare in use at the time the Treaty was negotiated. It is precisely for this reason that the Government of the United States does not believe that the Treaty was intended to apply to circumstances of modern warfare which are essentially different from those in vogue at the close of the eighteenth century. The Government of the United States does not understand upon what ground the Imperial Gov-



ernment contends that a treaty granting concessions under specifically mentioned circumstances, can be construed to apply to a situation involving other and different circumstances. To grant limited asylum in a neutral port to a prize accompanied by the capturing vessel is not the granting of a right of 'laying up' in a neutral port of a prize which arrives in the control of a prize master and crew.

"Your Excellency's Government further contends that Article 19, besides being applicable to modern conditions, is not contrary to the general rules of International Law and therefore not subject to a restricting interpretation, and in support of this cites as declaratory of the general rules of International Law Article 23 of Hague Convention XIII. As indicated by the Imperial Government, the United States did not in the case of this convention, and never has, assented to the sequestration of prizes in its ports. The ground of this position of the United States is that it does not, in the opinion

of this Government, comport with the obligations of a neutral  
44 power to allow its ports to be used either as a place of indefinite refuge for belligerent prizes, or as a place for their sequestration during the proceedings of prize courts. The contention of the Government of the United States in its note of March 2nd in this case, is consistent with this long-established and well-known policy of the American Government in the light of which the Treaty of 1799 was negotiated and has been enforced and applied. Provided the vessel enters an American port accompanied by a German naval vessel, Article 19 contemplates in the view of this Government merely temporary sojourn of the prize in an American port and not its sequestration there pending the decision of a prize court.

"Holding the view that Article 19 is not applicable to the case of the Appam, this Government does not consider it necessary to discuss the contention of the Imperial Government that under Article 19 American Courts are without jurisdiction to interfere with the prize, and for the same reason it cannot accede to the request that the 'legal steps before an American court should be suspended.'"

The letter further stated that the question of the court's jurisdiction was one for judicial ascertainment, and not executive determination.

The correct determination of the questions presented by the notes of the diplomatic representatives of the two governments, will in large measure dispose of the more important issues involved in this litigation, since it is apparent that if the view taken by the German Ambassador of the Prussian Treaty be accepted, then the Appam had the right by express treaty to come in for the purpose of laying  
45 up, as her prize master's commission directed; and the German government would be entitled to the free use of the waters of the United States during the existence of the war, as a rendezvous, or indefinite place of abode for prizes of war.

The gravity of this situation is manifest, and if the contention is correct, its value to the German government, on the one hand, and the serious responsibilities and consequences to the United States on the other, can not well be over estimated. The weight that should be given to the opinion and ruling of the Secretary of State, and

able and accomplished diplomat, in construing the Prussian Treaty, need not be dwelt upon, since the court is in full accord with his interpretation, further than to say that it has special significance as a decision and ruling of the executive branch of the government, having to do with international matters, rendered after its authority had been invoked by the German government, in this very matter.

The history of the adoption of this treaty with Prussia, the conditions that brought about the same, and the contemporaneous opinions of the eminent statesmen of that day, who participated in its procurement and acceptance by the two countries, has been gone into fully in the effort to show that it was meant to give asylum to prizes in neutral waters; and that its particular purpose was to afford the United States an asylum for their prizes in Prussian waters. Whatever may have been the view of those representing this country at that time, it seems clear to the court that no such enlarged and far reaching view of the treaty as is now claimed for it, can for a moment be entertained at this day, in the light of present methods of warfare, and the laws, rules and regulations affecting the neutrality

of nations in existence now for nearly one hundred years. 46 Anciently it was believed permissible for one nation to grant to another, rights and privileges in its waters not granted to others. Such may be said to have been the character of our treaties of Amity and Commerce of 1778, with France; but the painful outcome of our experiences, growing out of those treaties, and the position taken by this government, ultimately, in connection with them, would seem to dispel the idea that this country, even in that early period, ever intended to afford a harbor of refuge for prizes of war of any other nation, and certainly such idea is now uniformly negated by the customs of all nations. Article XVII of the Treaty of Amity and Commerce, is substantially in the terms of the Prussian treaty now being considered; and under the interpretation placed upon it by the United States (see Mr. Jefferson's letter to Gallatin, June 28, 1801, Moore's Digest, sec. 1302, page 931), the claim here made that a prize master could bring in his prize for indefinite asylum, was not maintained.

A careful review of the provisions of the Prussian treaty, when read in the light of the rulings and interpretation placed upon other contemporaneous treaties, especially Article XVII of the treaty of Amity and Commerce with France in 1778, convinces the court that the Secretary of State's ruling is correct, and that under the same, prizes can not be brought into the waters of the United States for the purpose of laying up by a prize master, but can only be brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize, and then not for an indefinite period, but for the temporary causes recognized by International Law.

What are the rights of the Appam under general international law. Was she entitled to come into the waters of the United 47 States, and if so, has she the right of asylum therein. These questions must be answered in the light of that law. The generally accepted doctrine now is that enlightened nations do not allow the use of their ports as asylum or permanent rendezvous of prizes of other nations captured during war. To do so would tend

to involve the neutral powers in conflict with nations with whom they are at peace; and to extend the use of their ports to all belligerents alike, would not relieve the objection, as the opposing vessels so using them might quickly cause conflict in neutral territory. The policy of the United States has been, and is consistently opposed to such use of their waters and harbors; and the history and origin of their neutrality laws, and the circumstances of their passage, clearly indicate a purpose to prohibit the use of their ports for the laying up of belligerent prizes.

The provisions of Articles 21 and 22 of the Hague Convention (XIII) of 1907, are declaratory of the existing law of nations, and the fact that Article 23, which provided for the use of neutral ports by belligerent prizes, was expressly rejected, and 21 and 22 adopted by the United States, but emphasises its policy respecting the subject. It is true Great Britain did not ratify the action of its Commissioners, assenting to the provisions of Articles 21 and 22 of the Hague Convention, though most of the other powers, some 43 in number, including Germany and the United States, did. Still, it nevertheless shows what the policy of the United States and Germany alike was, in regard to the use of their waters and harbors for belligerent prizes. Articles 21 and 22 are as follows:

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

48 It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

"Article 22. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

The American delegates reported regarding these Articles:

"Articles 21 and 25 relate to the admission of prizes to neutral ports. Articles 21 and 22 seem to be unobjectionable. Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse, and should not be approved."

The Hague Convention (XIII) was signed at the Hague on the 13th of October, 1907, and was ratified by the Senate of the United States in executive session on the 17th of April, 1908. That body, however, excepted and excluded article 23 (36. Stat. L. part 2, p. 2438). The law, as shown in Dana's note (1866) to Wheaton's International Law, 8th American Edition, sec. 391, is as follows:

"The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in cases of necessity; and they may remain in the ports only for a meeting of the exigency. The

necessity must be one arising from perils of the seas, or need of repairs for seaworthiness, or provisions and supplies."

49 The British government, at the beginning of the civil war in the United States, took this position, and so instructed the British admiralty. Subsequently, like position was taken by other prominent powers, and the same view has been taken generally from time to time by different nations down to our war with Spain in 1898, and to the present time. It was said by Attorney General Wirt:

"It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports, and put in a condition to be taken to the port of the captor for adjudication." (2 Op. Atty. Gen., 86.)

Mr. Seward, Secretary of State, replying to the Peruvian Legation as to the position of the United States respecting the war between Spain and Peru, said:

"This Government will observe the neutrality which is enjoined by its own Municipal Law and by the law of nations. No armed vessel of either party will be allowed to bring their prizes into the ports of the United States." Moore's Digest, Sec. 1302, p. 738.

In the *Flad Oyen* case, (1 C. Rob. 135) Lord Stowell, considering the subject, said:

"It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair advantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

50 "Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war within their cities, would be to make their coasts a station of hostility."

Reference may also be had to Hall's *International Law*, 5th Edition, p. 618, and "Laws of War," Risley, p. 176; Bluntschli on *International Law*, sec. 778, Int. Law, Note.

The right of belligerents to use neutral waters, as an asylum for prizes, can no longer be successfully contended for.

#### Second.

Considering the question of the jurisdiction of the court to entertain these suits, for restitution of the *Appam* and her cargo to the owners of the same, raised by the respondent, and earnestly insisted upon in argument, it may be said, without discussing the precedents of other countries favorable thereto, that the jurisdiction and authority of the courts of admiralty of the United States to entertain possessory actions for the restitution to their owners, of prizes of war

seized for violation of the neutrality laws, is no longer open for serious consideration. The subject was long one of much controversy, particularly whether restitution should be made by the executive or judicial branches of the government, and the authorities for a time sustained the view that the courts were without such power. *Moxon v. The Fanny*, 2 Peters Admiralty, 309; 17 Fed. Cas. No. 9895; *Findley v. The William*, 1 Peters Admiralty, 12, 9 Fed. Cas. No. 4790; *Stanwick v. The Ship Friendship*, Bee's Admiralty Rep. 40; *Moodie v. The Ship Amity*, Bee's Admiralty Rep. 89.

51 But this position is no longer maintainable, and has not been since the decision of the supreme court in the case of the *Betsy*, 3 Dallas, 6. There the question of jurisdiction was directly raised, and the supreme court held that the district courts, being possessed of all the powers of courts of admiralty, instance as well as prize courts, were competent to decide whether restitution should be made, and the law has been thus settled for more than one hundred years. The *Santissima Trinidad*, 1 Brockenbrough 438, Fed. Cas. 2568, affirmed in 7 Wheat. 283, a case from this court, was a decision of Chief Justice Marshall, sitting in the circuit court, in which he at length considered the question of whether restitution could be made, as well by the court, as by the executive branch of the government, and whether the same should be awarded at the instance of the private owners, and he sustained the jurisdiction of the court in both particulars, and ordered restitution of the prize seized for violation of the neutrality laws of the United States, to its owners. The supreme court, on appeal, affirmed the decision of the district court, rendered by Judge Saint George Tucker, the able jurist and author, and that of Chief Justice Marshall, sitting in review on circuit, and said:

"1. That 'whatever may be the exemption of the public ship herself and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and enquiry, and, if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality.'"

It is earnestly insisted on behalf of the respondents that notwithstanding these and like decisions containing the same views, restitution will be decree only in cases where the prize was captured within the territorial limits of the United States, or 52 the capturing vessel was illegally fitted out in this country, and that the court is without jurisdiction, save in the two classes of cases named.

There is much force in this position, especially as the adjudicated cases in the United States Supreme Court are mainly confined to those arising from the violation of the neutrality of one or other of the two prescribed classes. But it does not follow that had there been neutrality violations in other respects, a like remedy would not have been accorded. The jurisdiction was assumed, and the remedy afforded, because of the violation of the neutrality of the United States; and where the same arose either from an invasion of our territory by a belligerent, and the capture of an enemy vessel



in our waters, or by the fitting out of a vessel within this country for the purpose of depredating upon the commerce of the enemy, undoubtedly relief could be afforded by the restitution of the property thus unlawfully and forcibly taken, to its lawful owners. It was, however, not because it occurred in either of the two ways indicated. Had a like result followed in other unlawful manner, whereby there was an infraction of the neutrality of the United States, exactly the same relief should and would have been given. The question, therefore, to be determined in the present case is, in the language of the supreme court in the *Santissima Trinidad* case, 7 Wheat. 354-5, whether a proper case has been made out against the prize property, upon examination and enquiry, justifying its restitution to those from whom it was taken, by reason of bringing the same into our ports in violation of our neutrality; if so, the relief asked for by the libellants should be granted, entirely regardless of whether a like case may have heretofore arisen, or whether any other court of the United States may have been called upon to meet a similar contingency. Let it once be conceded that the prize is within neutral territory, and it was there brought in violation of the laws of neutrality, whether arising from breach of treaty obligation, or by reason of international law, then, under the laws of the United States, the right of restitution arises, and its courts of admiralty charged with the administration and enforcement of international law respecting maritime matters, should in a proper case, afford relief, by restoring the prize property to its lawful owner.

In *Paquete Habana*, 175 U. S. 677, 700, Mr. Justice Gray, speaking for the supreme court, said:

"International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act, or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is." *Hylton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215; *The Estrella*, supra, 4 Wheat. 298; *The brigantine Vrouw Christina Magdalena*, Fed. Cas. 7216; *The Adventure*, 8 Cranch. 221.

The last named case is an illuminating one in the light of the contention made here. The *Adventure* was a British vessel which had been captured on the high seas by two French frigates, and after taking out parts of her cargo, she was given by the captors to the American crews (then neutral) of two vessels which the French frigates had just captured and burned. The *Adventure* was thereupon navigated by her donees to Norfolk, where she arrived on the first day of October, 1812, and was promptly libelled by the acting captain and crew as their property, acquired under the donation of the French captor. The United States appeared and interposed a claim for forfeiture under the "Non-Im-

portation" act. The case finally reached the Supreme Court of the United States, where it was decided adversely alike to the claim of the government, and that of the libellants, and determined in favor of the British owners, subject to the adjustment of complications which had arisen between that government and this country, growing out of hostilities which occurred after the bringing in of the prize property; and that the donees, the libellants, as citizens of a neutral country, were entitled only to a proper reward for safe-keeping the property, and bringing it into a neutral port, the court saying:

"Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize master navigating the prize in pursuance of orders from his commander. The vessel remained liable to British capture on the whole voyage, and, on her arrival in a neutral territory, the donee sank into a mere bailee for the British claimant, with those rights over the thing in possession which the civil law gave for the care and labor bestowed upon it."

This decision is significant in its bearing upon this case. It was a capture on the high seas, and jurisdiction was entertained, and the property restored to its owner, although it did not come within the two exceptions contended for by the respondents. Moreover, it negatives the idea of a complete title in the captor, and in effect

maintains that the prize master could not have brought the  
55 prize into neutral waters, without forfeiting the same to the owner; and that his right to bring the vessel *infra presidia* (a place of safety) into this country, unless excused on account of necessity, would have been an unneutral act, reviving the right of the owner to the vessel.

The Queen v. The Chesapeake, 1 Oldright's Nova Scotia Reports, 769, was the case of an American vessel sailing from New York, captured by certain persons bearing a commission from the Confederate States Government, shipped thereon as passengers. After sailing from New York, they overpowered the captain and crew, and took the vessel into a Canadian port. Suit was instituted in the name of the Crown for forfeiture of the vessel for violation of the British neutrality. Claim was made on behalf of the private owners, and restitution was ordered, on payment of costs and expenses. (Moore's Digest, International Law, vol. 1, p. 366, vol. 7, p. 937.) In the course of his opinion deciding the question, the judge of the vice-admiralty court said: "By the affidavits upon which I granted a warrant it is certain that the Chesapeake, if a prize at all, is an uncondemned prize. For a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it *ipso facto* subjects that prize to forfeiture. For a neutral state to afford such protection would be an act justly offensive to the other belligerent state." At the prior hearing of the case, the court also said: "I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say remote uses, such as procuring provisions

and refreshments and acts of that nature which the Law of Nations universally tolerates, but that no proximate acts of war are in any way whatever to be allowed to originate on neutral grounds."

This power on the part of the courts of the United States may not be given specifically by any statute, as required for the exercise of criminal jurisdiction, but arises from the authority reposed in them under the constitution as courts of admiralty and common law, charged with the duty of administering the law of nations.

### *Third.*

Respondents further maintain that the Appam and her cargo can not be proceeded against in these causes, because title to the same vested in the German Government by reason of capture at sea by a German war vessel from an enemy country; that the Appam is a lawful prize of war, entitled to remain in the waters of the United States, a neutral power, without interference on the part of that government; and that its title can only be enquired into and divested by the action of the prize court of their own country.

No claim that the Appam is a public war vessel of the German empire can be maintained under the facts of this case. Indeed, in the pleadings, the contention is not made, and on the contrary she is claimed to be a prize of war, which places her in an entirely different category as respects title and ownership. Under modern authority, title does not become vested in the captor of the prize by mere capture, and not until lawful condemnation is had by the proper court of the captor country. This is particularly true where the prize is not taken into the captor's country. In the *Nassau*, 4 Wall. 640, the Supreme Court of the United States said:

"It is the practice with civilized nations when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the government of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property."

In the *Manila Prize Cases*, 188 U. S. 260, the supreme court said: "Ordinarily the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation."

The Resolution, 2 Dallas 1, 5.

The reason of this rule is manifest; and arises from the fact that until lawful condemnation by a court of competent jurisdiction is had of the prize property, the title of the captor, as between himself and the owner, is incomplete and inchoate, and circumstances may readily arise, of which this case affords an example, in which the title of the captor might never become vested, by reason of his own act.

Nor is the contention tenable that the Appam and her cargo have the undisputed right to stay in the United States, and that that

Government can not controvert her right, or this court entertain jurisdiction of these proceedings, and grant the proper relief to the libellants, irrespective of what the German prize court may do regarding the condemnation of the prize property. If the prize had been taken to a port of the captor country, or that of one of its allies, instead of to this, a neutral country, in violation of its laws, and of its international obligations to other countries, there would be great force in the position taken. Here, a very different situation arises.

in which it is manifest that the claim that this court should wait, or be controlled by what the German prize court does, is without merit. This position as to the effect of the prize court proceedings of the captor country has been often taken, and nowhere more positively denied than by the Supreme Court of the United States; and the same may now be said to be generally settled adversely to the claim made.

In *L'Invincible*, 1 Wheat. 238, the court said:

"That the mere fact of seizure as prize does not of itself oust the neutral admiralty court of its jurisdiction is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession, to wit, those in which her own right to stand neutral is invaded."

— The *Divina Pastora*, 4 Wheat. 52, the court said: "But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

In the *Santissima Trinidad* case, 7 Wheat. 554-5, *supra*, the supreme court further said:

"And 2, 'That where a property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can by its adjudication rightfully take away its jurisdiction or forestall and defeat its judgment.'"

Other cases sustaining these general views will be found in the same volume of Wheaton's Reports, pages 490, 496, 520.

In the case of the *Henrick and Maria*, 4 C. Rob. 43, Lord Stowell said: "Upon principle, therefore, it is not to be asserted that a ship brought into a neutral port is with effect proceeded against in the belligerent country. The *res ipsa*, the corpus, is not within the possession of the court; and possession, in such cases, founds the jurisdiction."

Dr. Lushington, the great authority on maritime matters, said:

"I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captor's country, and the court must guard itself against allowing a precedent to the contrary to be established." (The *Polka*, Spink's Ecclesiastical and Admiralty Reports, 447.)

In Dana's Note to Wheaton's International Law, 1866, it is said:

"But apart from any such practice of neutrals, it seems clear that to allow prizes to fly to a neutral port and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts

in neutral ports. It seems, therefore, to be the tendency, if not the settled rule, now, that a decree of condemnation will not be passed against prizes remaining abroad, unless in case of necessity, or if passed, will not be respected by other nations."

(Wheaton's Int. Law, 8th Am. Ed. Sec. 391.)

The further contention is made by the respondent that the violation of neutrality to be cognizable, must be proved to have contributed to the capture, and that subsequent or otherwise unrelated violations are immaterial. This proposition the court cannot assent to; that is, that there may be no violations of neutrality after the

60 prize is captured, entitling the belligerent owner to restitution at the hands of a neutral government, in whose country the property may be found. In this case, the fact should not be lost sight of that the violation of the neutrality of the United States is exceedingly closely related to the capture itself. This capture, it is true, was well away on the high seas, but the captors of their own volition, and for their own purposes, determined not to take, or attempt to take the prize to one of their own ports, or that of their allies, where alone the validity of the capture could be determined, though in distance not more than half so far away as the United States, nor to hazard longer the chances of her recapture at sea, but required the ship's officers and crew, under duress, to bring the ship into the nearest port of the United States, there to be laid up, and she was so brought, and the effort to secure permission to lay up was unsuccessfully made. From the moment of the capture, to that of entering the Virginia Capes, the Appam and her cargo were subject to recapture by the ships of the owner's country or that of their allies, or to be retaken by the owner. Should other or greater rights be secured by taking refuge in the harbor of a neutral, which the Appam had no right to enter without flagrantly violating the laws of neutrality. Does not such violation having for its object the getting away with the prize and the safe keeping of the same, so relate back to the original seizure, as to become a part thereof. Is not the capture, the flight to a supposed place of safety, and the successful entry therein, but one continuous occurrence, and should she, thus attempting to avail herself of the use of neutral waters for the purpose of escape with her prize, in contravention of the laws of neutrality, do so, without at the same time incurring the consequences of the violation? The failure to take, or even

61 attempt to take the prize to a port of the captor's country, or that of an ally, where prize proceedings could regularly and lawfully have been inaugurated, should prevent the captor from denying to the owner a day to be heard in the courts of the neutral country, where of choice, the prize had been brought and deposited, respecting his right to restitution of his property by reason of the violation of the neutrality of such neutral country. The validity of the capture, as well as all questions of prize law, are to be determined by the German prize court, and are not matters for the consideration of this court; but this court has the right to determine whether the neutrality laws of the United States have been violated, and the consequences thereof, as bearing upon the restitution of the



prize property to its owners, (The Estrella, 4 Wheat. 308) and in a proper case to restore the same to them.

The court's conclusion is that the manner of bringing the Appam into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or argument without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the Imperial Government of the German Empire; and it will be so ordered.

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### *Final Decree.*

Entered and Filed September 28th, 1916.

This cause came on to be heard on May 12, 1916, whereupon respondents moved for a postponement on the grounds stated in the affidavit of Hans Berg, and exhibits filed herewith, which motion was overruled by the court, to which respondents excepted:

And thereupon the cause came on to be heard upon the pleadings and proofs, and was argued by counsel.

The said hearing was at the same time as the hearing of the case of British and African Steam Navigation Co. Limited, v. the Steamer Appam, the evidence in said case being by agreement treated as the evidence herein, and the cases heard together in all respects except as to the entry of separate orders.

Prior to said hearing the perishable portion of the cargo had, by order of court on motion of Libellant (respondents not consenting thereto) been sold as perishable, and the proceeds of such sale, amounting to upwards of \$600,000 been deposited in the Registry of the Court.

And the Court not being then fully advised in the premises, took time to consider thereof.

And the Court, being now of opinion, for reasons stated in writing and filed as part hereof, that it has jurisdiction in the premises, and that libellant is entitled to the relief prayed for in the libel herein, doth order, adjudge and decree that the exceptions and plea of respondents to the jurisdiction be and the same are hereby overruled and that the Marshal of this District do deliver to libellant the possession of the unsold portion of the cargo herein, as of the 29th day of July, 1916, on which date the opinion of this Court was rendered and filed, and that the libellant is entitled to the net proceeds of the sale of such portions of the said cargo as have been sold as aforementioned, together with any increment thereof, and that libellant recover of and from the respondents the costs of the court duly taxed.

And thereupon the respondents presented to the court their petition for appeal and assignment of errors, praying the allowance of an appeal and supersedeas to this decree, and praying also that a transcript of the record in the cause may be sent up to the Supreme Court of the United States, and praying also for other relief:

And thereupon an appeal is hereby allowed in open court, bond to be given in the penalty of \$30,000.00 the same to operate as a supersedeas, staying all further proceedings in the execution of this decree, said bond to be executed with surity, to be approved by this court, or judge thereof, and payable and conditioned that the respondents shall prosecute their appeal to effect, and if they fail to make their plea good shall answer all damages and costs;

64 And thereupon the respondents tendered a bond in the words and figures following, to-wit:

In the United States District Court for the Eastern District of Virginia.

*In Admiralty.*

HENRY G. HARRISON, Master,

v.

CARGO OF STEAMER "APPAM."

Know all men by these presents, that we, Hans Berg, Prize-master, and L. M. von Schilling, German Vice-Consul, respondents and claimants, in this cause as principals, and The American Surety Company of New York as surety, are held and firmly bound unto the said Henry G. Harrison, Master, in the just and full sum of Thirty Thousand Dollars (\$30,000), to which payment well and truly to be made, the said Hans Berg, prize-master and L. M. von Schilling, German Vice-consul, as principals and the surety do hereby bind themselves and their and each of their executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 28th day of September, 1916.

Whereas on this day in the above entitled cause a final decree has been entered in favor of libellant and an appeal therefrom in open court has been prayed, and a clause therein provides that the execution of the said decree is suspended on executing an appeal bond,

Now, the condition of this obligation is such that if the above named claimants and respondents shall prosecute their appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.]

HANS BERG.

L. M. VON SCHILLING.

AMERICAN SURETY COMPANY  
OF NEW YORK,

By F. C. MILLER,

*Resident Vice President*

Attest:

L. T. DOBIE,

*Resident Assistant Secretary.*

65 And the same was executed and approved in open court to operate as a supersedeas, the unsold portion of the cargo of the steamer Appam to be held in the custody of the Marshal of this District pending such appeal, and the proceeds of sale after portion sold under the control of the court and subject to all orders of this court looking to its proper care and preservation.

And it is further ordered that, pending such appeal, the respondents do advance to the Marshal of this District, in cash, monthly, all costs and expenses attending the keeping of the said cargo in the custody of the said Marshal, including all expenditures that may be necessary in the discretion of the Marshal, subject to the supervision of the court, to keep said steamship in good condition and to prevent her from deteriorating in said custody.

EDMUND WADDILL, JR.,  
U. S. District Judge.

Norfolk, Va., September 28, 1916.

66 *Petition for Appeal.*

Filed September 28th, 1916.

The claimants and respondents, H. Berg, Prize-master, and L. M. von Schilling, German Vice-consul, considering themselves aggrieved by the final decree of the District Court made and entered on the 28th day of September, 1916, hereby appeal from the whole of said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors herewith filed, and prays that this appeal may be allowed, and that the said decree may be suspended during the pendency of this appeal; that a transcript of said record on appeal may be sent to the Supreme Court of the United States, and that said decree may be reviewed and reversed by said Court, and that respondents and claimants may have such other and further relief as the nature of the case may require.

HANS BERG, *Prizemaster*,  
L. M. VON SCHILLING,  
*Vice-Consul*,

By FREDERICK W. LEHMANN,  
JNO. W. CLIFTON,  
ROBT. M. HUGHES,  
W. S. PENFIELD, *Proctors*.

67 *Assignment of Errors.*

Filed September 28th, 1916.

The claimant and respondent assign the following errors:

1. The court erred in holding that the treaties between Germany and the United States had no application to this case.
2. The court erred in holding that the Prize-master and crew of the Appam were not entitled under the provisions of said treaties to

enter the harbor of Hampton Roads and lay up there, or remain there for the time shown by the record in this case, with said steamer, a lawful prize of war, without being subject to restitution to her former owners.

3. The court erred in denying the exemption of said prize while in said port from being arrested, searched or put under legal process, as provided in said treaties.

4. The court erred in holding that under the general principles of the law of nations the act of the prize-master and crew in bringing their said prize into said port under a bona fide claim of a treaty right, and remaining there under the circumstances shown

68 in this case, constituted such a violation of the neutrality of this country as entitled the former owner of said prize to a restitution of said prize by a decree of court.

5. The court erred in holding that it had jurisdiction to decree restitution under the circumstances shown in this case.

6. The court erred in holding that the title of the captor as against the former owner was not complete till formal condemnation.

7. The court erred in denying respondent's motion for a postponement till the close of the prize proceedings in Germany and reasonable opportunity to secure and file a complete record thereof; and to take testimony in Germany on commission; and in holding that the proceedings in this case were not affected by reason of said proceedings.

8. The court erred in entering a final decree in favor of libellant and in not dismissing the libel with costs.

HANS BERG, *Prize Master*,  
L. M. VON SCHILLING, *Vice-Consul*,

By FREDERICK W. LEHMANN,  
JNO. W. CLIFTON,  
ROBT. M. HUGHES,  
W. S. PENFIELD, *Proctors*.

69 *Stipulation of Proctors as to Record on Appeal.*

Filed October 4th, 1916.

It is agreed that the record in this case shall consist of the following:

Libel.

Protest of Lieutenant Hans Berg filed March 15, 1916.

Claim.

Exceptions, Plea and Answer.

Interrogatories as allowed.

Answer- to same.

Affidavit of Berg and exhibits therewith as to postponement.

Final Decree, containing copy of bond; the allowance of appeal, and opinion of court.

Petition for appeal.

Assignment of errors.

This Agreement.

## Order to transmit record.

## Certificate.

In order to shorten this record as much as possible, it is further agreed that this case came on and was heard at the same time as the case of the British and African Steam Navigation Company, Limited, against the Steamship "Appam", from which an appeal has been taken and which appeal is now pending as No. 650, October term, 1916. Although the decrees are kept separate these two cases were practically heard as one.

It is therefore agreed that the evidence in the said main case shall be considered as a part of this record as fully as if the same were herein reprinted; and that either side is at liberty to use any part of the record in the main case in addition to the evidence that may be desired, or may be pertinent, as fully as if the same were set out in this record and printed as part of this record.

It is further agreed that during the progress of this case the libellant moved the court to sell a large part of the cargo as perishable; that on said motion the court appointed surveyors who examined the said cargo and reported that the parts so designated as perishable should be sold; that upon their report orders of sale were entered, under which the parts so reported as perishable were sold, and that the proceeds of said sale, amounting to over \$600,000 are now in the registry of the court, and the unsold portions of the cargo are in the custody of the Marshal of this District.

ROBT. M. HUGHES,  
*For Appellants.*  
FLOYD HUGHES,  
*For Appellees.*

October 3, 1916.

71

## Order to Transmit Record.

Thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the foregoing cause, with all things thereunto relating, as stipulated by proctors of record, be transmitted to the Supreme Court of the United States at Washington, D. C.

And the same is transmitted accordingly.

Teste:

JOSEPH P. BRADY, *Clerk*,  
By D. ARTHUR KELSEY,  
*Deputy Clerk.*

## Certificate of the Clerk

UNITED STATES OF AMERICA,  
*Eastern District of Virginia, ss:*

I, Joseph P. Brady, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true record of the proceedings and judgment of the said Court, as stipulated by proctors of record, in the therein entitled cause.



In testimony whereof, I hereunto set my hand and affix the seal of the said Court, at Norfolk, in said district, on this 10th day of October, 1916.

[Seal U. S. District Court, Eastern Dist. of Virginia.]

JOSEPH P. BRADY, *Clerk*,  
By D. ARTHUR KELSEY,  
*Deputy Clerk*.

Endorsed on cover: File No. 25,552. E. Virginia D. C. U. S. Term No. 722. Hans Berg, prize master in charge of the prize ship "Appam," and L. M. Von Schilling, vice consul of the German Empire, appellants, vs. Henry G. Harrison, master of the steamship "Appam." Filed October 14th, 1916. File No. 25,552.

Office Supreme Court, U. S.

FILED

DEC 5 1916

JAMES D. MAHER  
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1916.

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No. 722.

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HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE SHIP "APPAM", AND  
L. M. VON SCHILLING, VICE-CONSUL OF THE GERMAN EMPIRE,  
*Appellants,*

VS.

HENRY G. HARRISON, MASTER OF THE STEAMSHIP "APPAM",  
*Appellee.*

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## MOTION TO ADVANCE.

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JAMES K. SYMMERS,  
HERBERT BARRY,

*Counsel for Appellee.*

Supreme Court of the United States, 1

OCTOBER TERM, 1916.

No. 722.

HANS BERG, Prize Master in  
charge of the Prize Ship  
"APPAM" and L. M. VON  
SCHILLING, Vice-Consul of the  
German Empire,  
Appellants,

vs.

HENRY G. HARRISON, Master of  
the Steamship "APPAM",  
Appellee.

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Now comes Henry G. Harrison, the appellee above named, by his counsel James K. Symmers and Herbert Barry, and moves that this cause be advanced upon the docket of this Court and set down for hearing upon some early date to be fixed by this Court, upon the following grounds:—

1. This is a suit in Admiralty by the master to recover possession of the cargo of the Steamship *Appam* taken as a prize upon the high seas by a German cruiser during the present War and sent under a Prize Master into a Port of the United States with instructions there to lay up said vessel and cargo. The District Court awarded possession to the libellant but stayed execution of the decree pending this appeal. 3

2. This cause involves important questions of international law and especially the question whether a naval prize may be sequestered in a neutral port of the United States.

4 3. This cause involves important questions affecting the Treaty relations of the United States with the German Empire and especially the construction, application and effect of certain provisions of the Treaties of 1799 and 1828 between the United States and the Kingdom of Prussia referred to in the appellants' answer herein.

4. The legal questions involved in this cause have a direct bearing upon the diplomatic and international relations of the United States with belligerents in the present war and it is to the public interest that these questions should be determined by this Court as speedily as practicable.

5 5. This cause involves the same questions as are involved in the case of the same appellants against British & African Steam Navigation Company, Limited (Number 650, October Term, 1916) in which a motion to advance was submitted to this Court on November 20th, 1916.

The said causes were tried together in the District Court and were decided under one opinion, although separate decrees were filed and separate appeals have been taken.

Dated, December 4, 1916.

JAMES K. SYMMERS,  
HERBERT BARRY,

6

Counsel for Appellee.

The appellants above named consent to this application.

Counsel for Appellants.





**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1916.**

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**No. 722.**

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**HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE SHIP  
"APPAM", AND L. M. VON SCHILLING, VICE CONSUL  
OF THE GERMAN EMPIRE, APPELLANTS,**

**vs.**

**HENRY G. HARRISON, MASTER OF THE STEAMSHIP  
"APPAM".**

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**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF VIRGINIA.**

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This is a companion to case No. 650. That was a libel filed by the original owner, the British and African Steam Navigation Company against the ship *Appam*, seeking restitution of the vessel, while this is a libel filed by the master of the vessel, seeking, as bailee for the original owners, restitution of the cargo. The one case involves the ship and the other the cargo. In other respects they are the same. The original owners in each case are British, the circumstances of the capture and of the coming into port were

necessarily the same in each case, and the same rules of law and treaty provisions are applicable. We submit this case upon the brief filed in the case of the vessel.

Respectfully submitted,

JOHN W. CLIFTON.  
FREDERICK W. LEHMANN.  
NORVIN R. LINDHEIM.  
ROBERT M. HUGHES.



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IN THE  
**Supreme Court of the United States,**  
OCTOBER TERM, 1916.

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No. 722.

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HANS BERG, Prize master in charge of the Prize  
ship "APPAM", and L. M. VON SCHILLING, Vice  
Consul of the German Empire, Appellants,

VS.

HENRY G. HARRISON, master of the Steamship  
"APPAM".

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**NOTES OF ORAL ARGUMENT SUPPLEMENT-  
ING THE BRIEF IN BEHALF OF AP-  
PELLEE.**

Every material issue arising in this cause will be  
determined in the answers to the following ques-  
tions:

1. Does the Prusso-American treaty apply?
2. If not, was the bringing in of the "Appam" in the circumstances disclosed permissible under international law as recognized and enforced in the United States?

3. Did the court below rightfully exercise jurisdiction and properly vindicate our neutrality by its decree of restitution?

All these questions are considered at length in the briefs filed, and it is not thought that it will be useful to attempt to add much to what is said in appellees' brief. One or two phases, however, may possibly be dwelt on further to advantage, and first the question of the legal effect of the seizure.

**LEGAL EFFECT  
OF SEIZURE.**

It is our contention that the question of the nature of the title, inchoate or otherwise, acquired by a belligerent through maritime capture is academic, and that whatever the nature of that title may be, it may be divested by our neutral government when our neutrality is violated by reason of the belligerent sending the vessel captured into one of our ports for the purpose of indefinite asylum.

As the appellants, however, appear to think it of importance to them to endeavor to show that full title to a maritime capture is vested in the government of the captor at the time of the seizure, I shall, in this argument, treat it more in detail than my own views of its importance would justify.

**SCOTT'S  
OPINION.**

In his article in the January, 1916, number of the *American Journal of International Law* (Volume 10, pp. 104-112) Dr. Scott expresses the opinion (p. 105) that—

"As according to the practice of nations it is legal to capture private property of the enemy upon the high seas, it would seem that capture vests title in the captor, and that judicial proceedings in such a case are only instituted by the government of the captor in order to determine whether the circumstances of the case justify capture, and if there be a municipal statute or practice granting the indi-

vidual captors a share of the prize money, to apportion the shares to which each person taking part in the capture is entitled."

He quotes from Hall's International Law, and adds that he has quoted these passages from Hall's treatise, as the statements by Hall on these questions are confusing, and as statements of a conflicting nature are to be found in the reports. He then goes on to deal with *Commodore Stewart's Case* (1 C. Cls. 113), in which, he says, "perhaps the clearest statement on the question of passing title is to be found", and apparently his own opinion on the question has been largely influenced, if not determined, by the opinion in that case.

He again considers that case at length in his article in the same Journal (October, 1916, Vol. 10, p. 827), where he remarks upon the confusion existing in the books on the question of the effect of capture.

In *Commodore Stewart's Case* the question was COMMODORE STEWART'S CASE. whether the individual captor had acquired any vested right by reason of the capture by him on the high seas of the "Levant," which was taken into a Portuguese port, where it was seized by the British in alleged violation of Portuguese neutrality. Chief Justice Casey, speaking for the Court, said:

"The principle applicable to this case, to be extracted from the authorities cited, is that by the capture of this ship the property to it vested in the United States, and whatever right to or title in it the claimants acquired must be derived from their sovereign authority."

In holding that Commodore Stewart had no right to or title in the capture except such as might be granted by the sovereign authority of the United States (which was the question necessary to be decided in the case) the Court doubtless correctly stated the result of the authorities. But, assuming

that the court meant to say that complete title or *dominium* was taken out of the original owner and vested in the government of the captor at the time of capture, it was not warranted by the authorities cited in the opinion, and upon which the court expressly rested its ruling in this respect.

The authorities cited by the Court upon this point were: Grotius, Lib. III, cap. 6, sec. 3; cap. 9, sec. 14; Kluber, *Droit des Gens Moderne de l'Europe*, sec. 254; Vattel, Bk. 3, cap. 13, sec. 196; cap. 14, sec. 209; Heffter, *Das Europäische Völkerrecht*, sec. 136.

Reference to these authorities will show that none of them supports the *dictum*.

Grotius in the place cited says:

GROTIUS.

"Things are considered as captured when they are brought within the boundaries or *infra præsidia*, under the protection of the enemy. Whence it seems to follow that at sea ships and other things captured are understood to be captured when, and not till, they are brought into dock or harbor or to the place where the fleet is; for then recovery becomes desperate."

KLUBER.

Kluber (*loc. cit.*, section 254) speaks of the twenty-four hour rule as relating, by the general consent of nations, only to booty captured in war conducted on land. He adds in the same section that some governments recognize the same rule as governing prizes, while others act on the principle that the property right of the original owner is not completely ousted until the prize is taken *infra præsidia*. He adds in a note that this latter was the Roman view, and that the same doctrine is laid down in the *Consolato del Mare*, ch. cclxxxvii.

VATTEL.

Vattel (Bk. 3, cap. 13, sec. 196) says:

"The ownership of movable property vests in the enemy as soon as such property comes into his power; and if he sells it to neutral

nations, the original owner cannot assert a claim. But such property must be really in the power of the enemy and must have been taken to a place of safety.

Likewise, at sea, a vessel captured by the enemy, so long as it has not been taken into a port or into the midst of a fleet, may be recaptured and delivered by other vessels of the same state.

The fate of the vessel is not decided, nor the property rights in it irretrievably lost to the owner until the captor has taken it to a place of safety and brought it completely within his power."

Heffter in sec. 136 is speaking of booty captured HEFFTER. in land warfare, and says that the original owner, upon finding in a neutral country the property taken from him by a belligerent enemy, has the right to assert there his ownership; and the author distinguishes between complete title or *dominium*, and that limited right to the thing possessed which the belligerent captor has as long as he retains firm possession. In other words, he distinguishes between ownership and the right of possession through capture. That he was correct in recognizing this distinction conclusively appears when we inquire into the nature of the peculiar right of possessing which is styled the right of possession; a right of possessing that arises exclusively from the fact of an adverse possession.

In Austin's Lectures on Jurisprudence (4th ed., AUSTIN. pp. 53-55) are found the notes of a lecture he had prepared, but which he did not live to deliver, in which he summarizes the result of his analysis of rights based on possession. He speaks of the source of his teachings on this subject as being Von Savigny's treatise, *Das Recht des Besitzes* (edition Giessen, 1837). He refers to that treatise in the following terms:

"of all books upon law, the most consummate and masterly; and of all books which I pretend



to know accurately the least alloyed with error and imperfection."

CIVILIANS.

It is confidently submitted that the divergent views, which, as Dr. Scott remarks, are found in the reports, will largely be reconciled if we bear in mind the analysis made by Von Savigny, the correctness of which is recognized generally by modern commentators on the Roman Civil Law (see Accarias, *Droit Romain*, Volume 1, Sec. 211 *et seq.*; Didier-Pailhé, *Droit Romain* (4th ed., Paris), ch. 4, pp. 156-162; see also Amos, *Roman Civil Law*, pp. 157-158).

The idea of possession involves two elements, one the *corpus*, or thing possessed, and the other, the *animus domini*, or the firm intention of treating the thing possessed as the property of the possessor. A captor, for instance, who seizes a ship with the express intention of treating her as prize, and thereby necessarily obtains physical possession of cargo that is contained in the vessel, cannot be said to possess the cargo in the same sense as he possesses the vessel, unless it was his intention to seize the cargo likewise as prize. In other words, so far as concerned the cargo only one element of possession would thus appear (*corpus*), and the other necessary element (*animus domini*) would be absent.

The argument of appellants is very largely dependent upon the establishment of the proposition that immediately upon the capture of *The Appam* (which they contend was not only begun, but completed, upon the high seas), the property seized vested in and became that of the German Empire. Its alleged immunity to neutral interference is based upon this claim, as a matter of International law. This contention ignores or disregards the very limited right gained by such a seizure before condemnation, or, at the very least, before arrival of the vessel seized *infra præsidia*. Possession, as Ulpian

pointed out, has nothing in common with ownership (L. 12, § 1, De acq. vel. amitt. poss.). Among the "divergent views" referred to by Dr. Scott loose expressions doubtless can and will be pointed out in support of appellant's contention in this behalf, but it is not necessary to go out of their own brief to find a striking illustration in a decision of this Court showing the correct principle to be as we contend. On page 41 of appellant's brief reference is made to the facts of the *Invincible*. The *Invincible* was a French privateer. She was captured by a British ship during the war of 1812. Possession by the captors was retained about a month when she was captured by an American privateer; these American captors in turn retained possession also about a month when she was captured again by a British ship. The British enjoyed this second possession for several weeks and again lost possession through American capture.

The *Invincible* was then brought into Portland, Maine, and was proceeded against as prize. The French consul interposed a claim for the French owners for restitution, subject to salvage.

This Court decided that the French owners were entitled to restitution—a decision that could not have been rendered had this Court shared the present appellant's view that the first British capture divested the French ownership and vested it in the British; that the first capture of the *Invincible* in turn by the Americans divested this "ownership" and vested it in the Americans, and so on until the arrival of the prize in the American port.

In fact, no property right of any kind results from a mere seizure of enemy property on the high seas. The right to destroy the capture is not a right of ownership but a belligerent right to destroy *enemy property*. Some confusion appears in the books upon this point and we find even Homer nodding in one paragraph of Kent where that author seems to

confuse the rules formerly applied generally to booty captured in land warfare with the rule obtaining in respect of maritime capture.

Kent.

Kent (1. Commentaries, 12th ed., p. 102) says:

"If any prize is taken at sea, it must be brought, with due care, into some convenient port for adjudication by a competent court; though, strictly speaking, as between the belligerent parties, the title passes, and is vested when the capture is complete, and that was formerly held to be *complete and perfect when the battle was over and the spes recuperandi was gone.*"

On page 103, however, he adds:

"By the modern usage of nations, neither the twenty-four hours' possession nor the bringing the prize *infra præsidia* is sufficient to change the property in the case of a maritime capture. A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals as the only sure way to furnish due proof that the seizure was lawful. . . . Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance or in a state of legal sequestration."

What capture on the high seas really divests is *possession*, not ownership. As Kent says, the *ownership* is not altered until condemnation. Some authorities are not so strict and think that the ownership is divested when the capture is brought *infra præsidia* of the captor's fleet, of a port of the government of the captor, or of a port of an ally or of a neutral that permits prizes to be brought in to await condemnation.

The appellant emphasizes the importance of the decision of this Court in the case of the "Mary Ford" (Brief, 23, 25). But that decision has no im-

portant bearing. There the Supreme Court, in its memorandum, merely said:

"In determining the question of property, we think, that immediately upon the capture the captors acquired *such a right* as no neutral nation could justly impugn or destroy; and consequently we cannot say that the abandonment of the 'Mary Ford', *under the circumstances of this case*, revived and restored the interest of the original British proprietors" (p. 198).

The *Mary Ford* was a vessel found apparently "MARY FORD." derelict on the high seas by Americans who brought her into the port of Boston and there libelled her for, and recovered, salvage. No question was involved of any violation of our neutrality, and the decision merely was that the abandonment of the *Mary Ford* by her captors *in the circumstances of the particular case* did not, *ipso facto*, revive and restore the interest of the original British proprietors.

This holding was apparently pursuant to the argument of the appellee (*id.*, p. 198) that the abandonment, having been *not from choice but of necessity*, left unimpaired such right as the captors acquired with possession, which they made firm by taking the vessel *infra præsidia* of the French fleet.

If the case could properly be understood as being "ADVENTURE." in any wise in conflict with the later decision in the case of *The Adventure* (8 Cr. 221) the fact would only strengthen *The Adventure* as a precedent, because, as Lord Bacon says:

"An example rejected in the same or next succeeding age, should not easily be received again when the same case recurs; for it makes not so much in its favor that men sometimes used it, as in its disfavor that they dropped it upon experience."

(Advancement of Learning, Book 8, c. 3—  
"Precedents" Aphorism No. 30.)

"JOSEFA  
SEGUNDA."

Another case strongly emphasized by appellants is the *Josefa Segunda*, 5 Wheat. 338. This was a libel for forfeiture for alleged violation of the Seventh section of an act of Congress prohibiting the importation of slaves into the United States. This section of the act provided:

"That if any ship or vessel shall be found in any river, port, bay or harbor or on the high seas, within the jurisdiction or limits of the United States, or hovering on the coast thereof, having on board any negro, mulatto or person of color for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States" "every such ship or vessel shall be forfeited to the use of the United States", etc.

It was found that the "*Josefa Segunda*" shortly before her seizure had been hovering on the coast of the United States having on board a large number of negroes with the intention of disposing of them as slaves within the United States. The libel was based on the violation of the act of Congress and no question of international law was involved. Incidentally it was recited that the capture of the "*Josefa Segunda*" on the high seas had been regularly made and that the courts of neutral nations had no right to interfere, "except in cases which do not embrace the present capture" (p. 358).

It appears at page 349 that the exceptions referred to relate to a violation of our neutrality. The Court said, page 358:

"The captors, therefore, at the time of the violation of our laws must be regarded as the lawful owners of the property and as capable of working a forfeiture of it by any infraction on their part of the municipal regulations of the United States."



By "lawful owners" of the property the Supreme Court must have meant that they were lawfully in possession by right of capture on the high seas under a regular commission and therefore capable of working a forfeiture in the same sense as a charterer or other person having lawful possession of the *res* could work a forfeiture thereof. The decision may be explained upon the theory of the liability of the *res* considered as the offending thing, a theory now familiar in our law and fully dealt with in Holmes' "*The Common Law*", pp. 25-29. See also *The Malek Adhel*, 2 How. 210-234.

*The Sally Magee*, 3 Wallace, 451, dealt entirely with the cargo and is merely an illustration of the familiar rule that ownership of property *in transitu* cannot be changed to the prejudice of the captor. "SALLY MAGEE."

Dr. Scott, who in the first of his articles above mentioned says that "it would seem that capture vests title in the captor", on the same page (*American Journal of International Law*, January, 1916, Volume 10, page 105) admits that it has become the settled practice of nations to proceed against the vessel captured in a competent prize court, and Mr. Hall, whom he quotes on the same page, also admits that, "It is the universal practice" for the belligerent to guard the interests of neutrals, SCOTT. HALL.

"by requiring captors, as a general rule, to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy."

The reasons given for the practice may or may not be sound. The important fact is that the practice itself is settled and universal.

In *Oakes v. United States* (1899), 174 U. S., 778, *OAKES v. U. S.* 786, this court said:

"By the law of nations, as recognized and administered in this country, when movable

property in the hands of the enemy, used or intended to be used for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors.

1 Kent Com., 102, 110;

Halleck, Int. Law, c. 19, sec. 7; c. 30, sec. 4;

*Kirk v. Lynd*, 106 U. S., 315, 317".

Moore, Int. Law Dig., Vol. 7, page 631.

POSSIBLE  
NEUTRAL  
INTEREST.

As we have seen, the authorities all agree on the point that the rights of the original *neutral* owner certainly cannot be deemed to be ousted by maritime capture before a decree of a competent court adjudging the capture good prize. Appellants argue that this admittedly correct doctrine is not applicable here, because of the alleged fact that both vessel and cargo were enemy owned. But in this do not the appellants take too much for granted? It was not necessary for such neutrals as may have owned portions of the cargo of the "Appam" to allege and prove neutral ownership in the court below. The libel was filed in behalf of all the owners of the cargo by the master as bailee. In view of the assumption indulged by appellants, the Court's attention perhaps should be directed to the pleadings in the cargo case and to the evidence respecting the detention of the cargo.

LIBEL.

The libel in behalf of cargo does not allege any seizure of the cargo libeled, or any detention of said cargo on the high seas. It alleges that the *steamer* was seized on the high seas, and that she *with her cargo* subsequently arrived at Newport News, and that

"the cargo of said steamship 'Appam' has been and is unlawfully held and detained at Newport News; and that by holding and detaining the

said cargo at Newport News the said Hans Berg and others . . . have violated the . . . neutrality of the United States," etc. (Rec., No. 722, pp. 2, 3).

The answer does not put this in issue, but merely ANSWER. alleges:

"It does not appear that according to the law of nations and the laws of the United States they have not been and are not entitled to hold and detain *the said steamer* at Newport News" (Rec. No. 722, p. 7).

The eighth article of the answer (Rec. No. 722, p. 8) merely puts libellant to his proof that he was master, and as such bailee entitled to the cargo for the owner thereof.

Nor is there in the case a scintilla of evidence that EVIDENCE. the "Möwe" or Lieutenant Berg ever seized or intended to seize the cargo when they took the vessel. Lieutenant Berg's instructions did not mention or relate to the cargo (Rec. No. 722, p. 12), but ordered him to take the vessel in and lay her up. The evidence as to what the captors intended to seize, as gathered from their statements to the master of the "Appam" at the time of the capture, is to the effect that they intended to seize the ship:

"I am very sorry, Captain, but I must take your ship" (Rec. No. 650, p. 23),

and nothing was said about seizure of cargo, although inquiry as to its nature was made. The evidence as to the prize proceedings instituted in Germany, if competent, only shows that the vessel was proceeded against there (Rec. No. 722, pp. 14, 15).

The German Ambassador never protested against and objected to the court taking jurisdiction of the master's libel against cargo, although he carefully caused to be put on record his protest in case No. 650, the libel filed in behalf of the owner of the

AMBASSADOR'S  
PROTEST, &c.

vessel. His later suggestion to the State Department that the matter be left to arbitration concerned only the vessel's case—not that of the cargo (Rec. No. 650, pp. 70, 71).

*Non constat* but that for good reasons the captors refrained from seizing the cargo proceeded against herein, and that Lieutenant Berg and the German Consul were acting without authority in assuming to detain it from its owners after it reached Newport News. Certainly it cannot be said that the seizure of cargo is to be implied in the seizure of its container, the vessel. Lieutenant Berg was in court and did not take the stand. If there ever were a seizure of the cargo as such on the high seas, or any intention of claiming it as prize captured there, he could have testified accordingly, and his failure to take the stand, notwithstanding that there was no other evidence tending to show a seizure of the cargo, should be conclusive that there was no such seizure.

The seizure of the specie and of the contents of the purser's till (Rec. No. 722, p. 10), respondents themselves say, "are not material to the issues in this cause"—those items not being part of the cargo proceeded against.

The inference is that the specie was seized as contraband, and that a distinction was made by the "Möwe" between this portion of the cargo and the remainder.

**LIBELANT'S  
PROOF.**

The libelant has proved that he was the master of the "Appam". As such he was the bailee of the cargo. As bailee he is entitled to the possession of the cargo, which the Germans certainly could not take in our waters. At the time the master filed his libel the vessel was not in possession or control of the respondents, but in the custody of the court under process issued in the suit brought by her owners, and the respondents have not shown that

they have any interest in the cargo, any right to detain it, or any right to intervene in this case as claimants thereof.

It is true that in a competent prize court the cargo of an enemy vessel is presumed to be enemy cargo; but that presumption will not be entertained or avail the appellants here, where there is no proof of any intention to seize the cargo here libelled, and where, as the authorities above cited show, intention to seize is an essential prerequisite to the acquisition of the limited title that arises from the fact of firm possession.

It is deemed unnecessary, however, to emphasize this defect in appellants' pleading and proof. The case of the cargo and the case of the hull might safely be rested upon the violation of our neutrality.

Expressions may be found in the older authorities, and even in our own decisions, that seem to evidence that prior to 1860 neutrals sometimes permitted belligerent prizes to lie up in neutral ports pending condemnation. Phillimore said that no regular practice had prevailed up to his time (Vol. 3, p. 577). But whatever the international practice recognized by us in this regard may have been a hundred years ago, certainly our practice, and the practice of the other great commercial nations, since the beginning of our civil war, has been to forbid a prize to be brought into a neutral port except for the reasons now specified in article 21 of the Hague Convention, XIII of 1907.

This is abundantly shown in Admiral Semmes' interesting "Memoirs of Service Afloat".

PRACTICE FROM  
1860 ON.

The attitude of the United States, if uncertain before, was sufficiently definite on this question from the very beginning of the war and Semmes soon found that Great Britain, France, Spain, Holland and other countries shared our government's view. Semmes' prizes were uniformly excluded from all



neutral ports. We find him writing the Military Governor of Cadiz, January 5, 1862 (*Ib.*, p. 298), as follows:

"I am aware of the rule adopted by Spain, in common with the other great powers, prohibiting belligerents from bringing their prizes into her ports, but this rule I have not violated."

On July 24, 1861 (*Id.*, p. 161), he writes that as a last resort he had endeavored to avail himself in this way of the ports of certain "beggarly South American Republics".

"But, as the reader will see, I reckoned without my host. . . . If they had admitted my prizes into their ports, I could, in the course of a few months, have made those same ports more busy with the hum and thrift of commerce than they had ever been before; I could have given a new impulse to their revolutions, and made them rich enough to indulge in the luxury of a *pronunciamiento*, once a week. The bait was tempting, but there stood the great lion in their path—the model Republic. The fact is I must do this model Republic the justice to say that it not only bullied the little South American republics, but all the world besides. Even old John Bull, grown rich and plethoric and asthmatic and gouty, trembled when he thought of his rich argosies, and of the possibility of Yankee privateers chasing them" (*Ib.*, pp. 161, 162; for further references see pp. 151, 152; 532, 533).

Of this phase of this violation nothing more need be said, but there is another that may be mentioned which alone would justify restitution of the capture to the libelants.

It is elementary international law that

"the duty of navigating the vessel to such port as the captors may please to direct is not imposed upon the master and crew of a captured vessel. They owe no service to the cap-

VIOLATION OF  
NEUTRALITY—  
ENFORCED  
WORK IN OUR  
WATERS.

tors, and are still to be considered answerable to the owners for their conduct.

It is the duty as well as the interest of the captors to make the capture sure; if they neglect it, from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their peril."

(Wildman, Int. Law (Phila. ed., 1850), Volume II, p. 97.)

In the present case the prize crew was insufficient to bring the vessel in; she was operated by her original crew under threats of death. While this may not have concerned us so long as the outrage was confined to the high seas, this compulsory operation of the vessel from the three-mile limit to place of anchorage (for the threats did not purport to be confined to the operation on the high seas) was an outrage continuing within our neutral waters, continued there because it was necessary to *complete the capture*, and this was in itself a breach of our neutrality that warranted the release of the vessel and cargo.

If it be contended that, by reason of being used incidentally to transport the *Möwe's* prisoners to land, the *Appam* is to be treated as our State Department treated the *Farn*, the distinction is clear. The *Farn* was commissioned *bona fide* and officered and used regularly as a tender. She was thus stamped by the German Government as a public vessel as effectually, in the circumstances perhaps, under the practice of Nations, as if she had been regularly condemned by a Prize Court. Semmes was perfectly familiar with this distinction. Speaking of his tender, the *Tuscaloosa*, he writes (*Ib.*, p. 663): "The Sovereign Power of the Confederacy . . . had commissioned her as a ship of war, which was the most solemn condemnation of the Prize that the Sovereign could give." Semmes captured a vessel—the *Ariel* (*Ib.*, pp. 532, 533), which stood to him

in the same relation as the *Appam* to the *Möwe*. "The *Ariel*", he says, "was indeed a California steamer, but instead of being a homeward bound steamer, with a million of dollars in gold in her safe, I had captured an outward bound steamer, with five hundred women and children on board! This was an elephant I had not bargained for, and I was seriously embarrassed to know what to do with it. I could not take her into any neutral port, even for landing the passengers, as this was forbidden by those unfriendly orders in council I have more than once spoken of, and I had no room for the passengers on board the *Alabama*. The most that I could hope to do was to capture some less valuable prize within the next few days, turn the passengers of the *Ariel* on board of her, and destroy the steamer."

To Semmes' honor be it said that it never entered his head to pretend that she was a *tender* by which these women and children might be sent to port. On the contrary, no other prize being available, as hoped for, he turned the *Ariel* loose and sent her passengers on their way rejoicing.

And so with the *Appam*. The *Möwe's* orders to the prize master, the pleadings, the diplomatic correspondence, the wireless messages from Germany—all the evidence in the case—stamp her as a captured merchantman intended to be reduced to the status prize. Any other suggestion would be a mere after thought of counsel.

CONSTRUCTION  
OF TREATY.

One word as to the proper interpretation of the treaty:

Appellants invoke a liberal construction of the treaty. In the first place, no document, treaty or otherwise, admits of construction, liberal or illiberal, except where it is ambiguous.

*Hauenstein v. Lynham*, 100 U. S. 483, 487.

It is submitted that there is no necessity for "construction" in respect of this particular treaty at all. It is plain and unambiguous. Even were it otherwise, there is nothing in the nature of maritime capture of private property on the high seas that should induce any modern court to lean in favor of rights claimed thereunder.

On July 28, 1823, Mr. Adams, Secretary of State, wrote to our Minister to England as follows:

"It has been remarked that by the usages of modern war the private property of an enemy is protected from seizure and confiscation as such; and private war itself has been almost universally exploded *upon the land*. By an exception, the reason of which it is not easy to perceive, the private property of an enemy *upon the sea* has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean and there continued to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy. To a government intent, from motives of general benevolence and humanity, upon the final and total suppression of the slave trade, it cannot be unreasonable to claim her aid and co-operation to the abolition of private war upon the sea.

NATURE OF  
SEIZURE OF  
PRIVATE  
PROPERTY.

From the time when the United States took their place among the nations of the earth this has been one of their favorite objects.

'It is time,' said Dr. Franklin in a letter of 14 March, 1785, 'it is high time for the sake of humanity that a stop were put to this enormity. The United States of America, though better situated than any European nation to make profit by privateering, are, as far as in them lies, endeavoring to abolish the practice by offering in all their treaties with other powers an article engaging solemnly that in case of future war no privateer shall be commissioned on either side, and that unarmed merchant ships on both sides shall pursue their voyages

unmolested. This will be a happy improvement of the law of nations. The humane and the just can not but wish general success to the proposition.' "

(Moore, Int. Law Dig., Volume 7, pages 462-463).

NO EXTENSION  
OF TREATY TO  
CASES OMITTED.

Apropos of the contention that a liberal construction should be given to the terms of this treaty to the end that our neutral Government may render such aid to Germany as will make effectual her capture on the high seas of a merchant ship belonging to subjects of a friendly country, the Court is again referred to Lord Bacon, who said that it is enough for such statutes as were made upon particular urgent occasions of state to contain themselves within their proper cases after those occasions cease,

"for it were preposterous to extend them in any measure to cases omitted."

(Advancement of Learning, 8th book, c. 3,

"Application and Extension of Laws",—

Aphorism No. 15.)

*admits that it is a case for extension of the treaty to a condition of affairs not contemplated by the treaty.*  
Summary. The treaty was made

I need not repeat what is said in our principal brief or what my learned associate has already said. The considerations I have advanced are intended to be not exhaustive, but merely supplemental. It sufficiently appears that the *Appam* had no right to come in under the treaty; that under international law as recognized and enforced by us since 1861 and recently re-announced by us in the rejection of the proposed Art. 23 of The Hague Convention, she was forbidden to come in as she did. That her coming in, in the face of this prohibition, was a clear breach of our neutrality and that in restoring her to her British owners the



District Court properly vindicated the right of our country to stand neutral and did just what Great Britain would have done, as evidenced by her practice during our civil war, were our positions reversed, and just what her Colonial Court did in the case of *The Chesapeake*.

In the case of *The Santissima Trinidad* (7 Wheat. 283) Mr. Justice Story said: "It does not lie in the mouth of wrongdoers to set up a title derived from a violation of our neutrality." It is true that in that case the violation was the unlawful fitting out of the cruiser in our ports. But the same language is appropriate to the violation of our neutrality in the present case.

As long as the *Appam* was on the high seas her captors had possession, but no title—no *jus in re*. And even that possession was of so infirm a character that her captors could hope to make it firm and of any value only by proceeding, by an unfrequented route without showing flag or lights, to an American port where it was fancied that an ungrateful republic might forget the practice, of the civilized world, that we ourselves procured to be adopted in 1861.

Respectfully submitted,

JAMES K. SYMMERS,  
Of Counsel for Henry G. Harrison,  
Master, &c., Appellee.

## THE STEAMSHIP APPAM.<sup>1</sup>

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF VIRGINIA.

Nos. 650, 722. Argued January 15, 16, 1917.—Decided March 6, 1917.

The British merchant steamship *Appam*, captured on the high seas by a German cruiser and navigated to a port of the United States in control of German officers and crew, during the war between

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<sup>1</sup> The docket titles of these cases are: No. 650, *Hans Berg*, Prize Master in charge of the Prize Ship "*Appam*," and L. M. Von Schilling, Vice-Consul of the German Empire, Appellants, v. British & African Steam Navigation Co.; No. 722, *Same* v. Henry G. Harrison, Master of the Steamship "*Appam*."

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Argument for Appellants.

Great Britain and Germany, is *held* to have been brought here as a prize.

Under the principles of international law, as recognized by our government since an early day in its history and as emphasized in its attitude in the Hague Conference of 1907, it is a clear breach of our neutral rights for one of two belligerent governments, with both of which we are at peace, to make use of our ports for the indefinite storing and safe-keeping of prizes captured from its adversary on the high seas.

Failure of our government to issue a proclamation on the subject will not warrant the use of our ports to store prizes indefinitely, and certainly not where the possibility of removal depends upon recruiting crews in violation of our established rules of neutrality.

The Treaty with Prussia of 1799, 8 Stat. 172, 173, Article 19, makes no provision for indefinite stay of vessels, and includes prizes only when in charge of vessels of war.

The violation of neutrality committed by a belligerent in wrongfully making use of one of our ports for storing indefinitely a merchant vessel and cargo captured on the high seas, affords jurisdiction in admiralty to the United States District Court of the locality to seize the vessel and cargo and restore them to their private owners.

In such case, proceedings in a prize court of the belligerent country could not oust the jurisdiction of the District Court having the vessel in custody or defeat its judgment.

234 Fed. Rep. 389, affirmed.

THE case is stated in the opinion.

*Mr. Frederick W. Lehmann*, with whom *Mr. John W. Clifton*, *Mr. Norvin R. Lindheim*, *Mr. Robert M. Hughes* and *Mr. Walter S. Penfield* were on the briefs, for appellants: <sup>1</sup>

The capture of the *Appam* was a lawful act of war, and vested the property in the ship in the German Empire, as between the parties to this suit, since confessedly no property rights of neutrals or of individual captors are

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<sup>1</sup> Lack of space prevents a full representation of the interesting arguments made in this case. The reply briefs have suffered especially in the attempt at condensation.

involved. *The Mary Ford*, 3 Dall. 188. As between the belligerents, the capture, undoubtedly, produces a complete divestiture of property. *The Adventure*, 8 Cranch, 221, 226; *The Adeline*, 9 Cranch, 244, 285; *The Astrea*, 1 Wheat. 125; *The Josefa Segunda*, 5 Wheat. 338; *The Sally Magee*, 3 Wall. 451; *The Nassau*, 4 Wall. 635; *Manila Prize Cases*, 188 U. S. 254; Westlake, *International Law*, vol. 2, 2d ed., p. 309; Wheaton, *Maritime Captures and Prizes*, c. 9, § 5, p. 259; Mr. Lansing to the English Ambassador, March 13, 1915, *Diplomatic Correspondence, European War*, Department of State, No. 2, p. 140. The property of a neutral is of course not divested until sentence of condemnation. *Hudson v. Guestier*, 4 Cranch, 293, 295.

That jurisdiction of prize cases is vested exclusively in the courts of the captor government, and that the mere entry of a prize into neutral waters is not necessarily a breach of neutrality, are propositions conceded by the appellees.

It is not essential to the jurisdiction of the courts of the captor country that the prize be brought into one of its ports. *Hudson v. Guestier*, *supra*; *Jecker v. Montgomery*, 13 How. 498, 515. The courts of the neutral country may inquire whether the vessel is held as a prize of war, or whether her taking was a violation of the neutrality of their country, but no further. *The Alerta*, 9 Cranch, 359; *The Betsey*, 3 Dall. 6; *The Invincible*, 13 Fed. Cas. 72; *The Invincible*, 1 Wheat. 238. Under all the decisions of this court, when the *Appam* was found to be a prize of war, the libel should have been dismissed, unless it was further found that in the circumstances of the capture itself there was a violation of our neutrality.

Bringing the *Appam* into our waters did not authorize restitution to the original British owners. The breach of neutrality which will forfeit a prize of war must be one which invalidates the capture itself, which involves

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the neutral nation as a participant in the act of war committed in taking the prize. If the capture is made in the neutral waters and the prize is brought within the jurisdiction of the sovereign whose neutrality has been violated, restitution will be decreed, because the capture was an act of trespass upon the sovereignty of the neutral power, and moreover, a violation of the shelter and asylum which the captured vessel had a right to expect in the neutral waters.

And of like nature is the case where the captor ship has been equipped, or its equipment has been augmented, within the neutral territory. Bringing the vessel in is not the foundation of the right to redress, it simply gives opportunity to award and enforce redress. The exceptions to the rule as to the exclusive cognizance of prize cases by the courts of the captor country have never been extended to cases of alleged violation of neutrality after the capture, and not inherent in the capture. The policy of our government was fixed and made public during the administration of Washington, and has been adhered to ever since, and the decisions of this court are in perfect harmony with that policy. See Jefferson to British Minister, 1793, 4 Jefferson's Works, H. A. Washington ed., p. 78; Washington to Congress, 1793, 1 Am. State Papers, p. 21; *Talbot v. Jansen*, 3 Dall. 133; *The Alerta*, *supra*, 359; *The Invincible*, 1 Wheat. 238; *The Divina Pastora*, 4 Wheat. 52; *The Estrella*, 4 Wheat. 298; *The Neustra Senora de la Caridad*, 4 Wheat. 497; *La Amistad de Ruës*, 5 Wheat. 385; *La Conception*, 6 Wheat. 235; *The Santissima Trinidad*, 7 Wheat. 283; *The Gran Para*, 7 Wheat. 471; *The Santa Maria*, 7 Wheat. 490; *The Monte Allegre*, 7 Wheat. 520.

Where, as in this case, the capture was a valid act of war, made under the commission of a belligerent power on the high seas, and the capture is complete, the crew of the captured ship submitting to the control of the cap-



tors, and there remains nothing but the hope of recapture, a hope that is not realized, the captured ship is good prize and is the property of the captor government, as much so as are its ships of war, and what its rights or privileges in our ports may be, how long it may stay, or whether it may come into them at all, are questions between our government and the government of the captors, and do not at all concern the original owner of the captured ship. He has not been injured, he has lost nothing by such acts. See *The Anne*, 3 Wheat. 435; *The Sir William Peel*, 5 Wall. 517; *The Adela*, 6 Wall. 266; *The Florida*, 101 U. S. 37; *Queen v. The Chesapeake*, 1 Oldright (Nova Scotia), 797; *Williams v. Armroyd*, 7 Cranch, 423.

The *Appam* is a public ship of the German Empire, and entitled to all the rights and immunities of such a ship. As the property of the German Government the ship was public property—a public ship—and could be nothing else. That government might devote her to any use it deemed proper or might destroy her altogether. A ship may be a public ship without being a ship of war. Hall, *International Law*, 5th ed., p. 161. The Government of the United States in this war has announced its intention to treat a prize as a public vessel. *Neutrality Proclamation re Panama Canal*, November 13, 1914, *Diplomatic Correspondence, European War*, Department of State, No. 2, pp. 18, 19. Our ports are open to the public ships of friendly powers, and they may remain while our government allows. *The Exchange*, 7 Cranch, 116. Their exemption from the jurisdiction of our courts depends rather upon their public than upon their military character. *Briggs v. Light Boats*, 11 Allen, 157, 186. The general practice of our government has been in harmony with the views we present. John Paul Jones to Robert Morris, 1783, 7 *Diplomatic Correspondence of the United States*, p. 288; Franklin to Danish Minister, 3 Wharton,

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Diplomatic Correspondence of the American Revolution, p. 433; Franklin to Jones, 1785, 7 Diplomatic Correspondence of the United States, p. 341; Resolution of Congress of Confederation, October 25, 1787, *id.*, p. 362; Jefferson to Danish Secretary, 1788, 6 Jefferson's Works, Monticello ed., p. 414; Jefferson to British Minister, 1793, 1 Am. State Papers, Foreign Relations, p. 176; 4 Jefferson's Works, H. A. Washington ed., p. 65; Moore's International Law Digest, vol. 7, p. 983; Wheaton to Prussian Minister, 1843, *id.*, p. 982; Cushing to Marcy, 7 Ops. Atty. Gen. 122, 125, 129, 131; Semmes' Correspondence with British authorities, 1864, Semmes' Service Afloat, pp. 663, 741, 743.

In the treaties with Prussia, 1785 and 1799, Art. XIX, the purpose of each party was to obtain shelter for its warships and prizes in the ports of the other. The right of prizes to come into port and their immunity while there constitute the substance of the article, not the manner of coming in or going out. They may "come and enter," and may be "carried out again" at any time. The common and proper use of the word "carry" includes the ideas of *sending* and *bringing*. In *The Felicity*, 2 Dods. 281; *s. c.*, 2 Roscoe's Prize Cases, 233, Sir William Scott used *carry* and *bring* interchangeably. A prize may be brought into port by a prize crew as well as under convoy. *The Alexander*, 8 Cranch, 169; *The Eleanor*, 2 Wheat. 345. The bringing in either case is the act of the captor. In all the correspondence leading up to these treaties we have seen nothing to suggest that on either side it was deemed material whether a prize was brought in alone, by the prize crew, or whether it was brought in by the captor vessel. Everything indicates that it was all one to the parties how the prize got into port so long as it got there. And our commissioners abroad used the words *carry* and *send* indifferently to describe the taking of a prize into port, whether with or without convoy. Franklin to Ver-

gennes, concerning the prizes "sent to Bergen," 1782, 7 Franklin's Works, (ed. John Bigelow), p. 397. In a minute of their proceedings, as ministers plenipotentiary on August 30, 1784, Franklin, Adams, and Jefferson speak of these prizes as taken by Jones and "carried into Bergen." 2 Diplomatic Correspondence of the United States, p. 196. Jones himself in a letter to the Marechal de Castries, of February 18, 1784, speaks of them as "sent into port." 7 Diplomatic Correspondence of the United States, p. 294. See also Franklin to Jones, 1778, 1 Sparks' Diplomatic Correspondence, American Revolution, p. 361; Jefferson to Baron de Blome, 1786, 2 Jefferson's Works, (ed. H. A. Washington), p. 13; Order of Congress, 1787, 7 Diplomatic Correspondence of the United States, p. 364; Act of March 28, 1806, 6 Stat. 61. The treaty is to be construed in view of the circumstances and conditions which prompted to its adoption. Vattel, Book II, c. 17, § 287; *Hauenstein v. Lynham*, 100 U. S. 483; *Tucker v. Alexandroff*, 183 U. S. 424. The arrangement with Prussia originated while we were at war with England, and anxious to war on British shipping and safeguard prizes. Prussia had no navy or large maritime interests. The treaty was made out of friendship to this country and at its earnest solicitation. The similar treaty with France of February 6, 1778, Art. XVII, Molloy, vol. 1, p. 474, actuated by the same motive, was construed as allowing prizes to be sent in without convoys. Franklin to Jones, 1779, Senate Reports, 63, 29th Cong., 2d sess., p. 5; Hamilton to Collectors of Customs, 1793, 1 Am. State Papers, Foreign Relations, p. 140; Jefferson's opinion, 6 Jefferson's Writings, p. 223; Jefferson to Genet, *re The Fanny*, 1793, l. c. 329, note. See also questions and opinion formulated by Jefferson for the Cabinet, 1793, l. c. 351, 370, and his letters to Morris and the British Minister, same year, l. c. 383, 423, 444. See further Washington's Message of December 3, 1793, 1 Messages of the Presidents (Rich-

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ardson), p. 139; *Solderondo v. The Nostra Signora*, 21 Fed. Cas. 225; *Reid v. Vere*, 20 Fed. Cas. 488. See the treaties of like purpose and effect with *The Netherlands*, October 8, 1782, Molloy, vol. 2, pp. 1238, 1239; 3 Wharton, *International Law*, p. 527; and with Sweden, April 3, 1783, Molloy, vol. 2, p. 1732, the latter taken as a model by Prussia. 8 Works of John Adams, pp. 183, 191, 193. Further as to the purpose and history of the Prussian Treaty: Franklin and Deane to Continental Congress, 1777, 2 Wharton, *Diplomatic Correspondence, American Revolution*, p. 322; Lee's letter from Berlin, 1777, 2 Sparks' *Diplomatic Correspondence, American Revolution*, p. 88; Baron Schulenburg to Lee, 1778, 2 Wharton, *Diplomatic Correspondence, American Revolution*, p. 472; Adams, Franklin and Jefferson to Baron Thulemeier, 1785, 2 *Diplomatic Correspondence of the United States*, p. 276; the latter's reply, 1785, l. c. 304; Washington to Rochambeau, 1786, 9 Sparks' *Writings of Washington*, pp. 182, 183; Hamilton, 1795, 5 *Hamilton's Works* (ed. Henry Cabot Lodge), p. 113.

Article XIX of the first Prussian Treaty, modified in 1799, was revived by the Treaty of 1828, excluding the provision which related to prizes made on British subjects. The letters exchanged March 31 and April 4, 1916, between the British Ambassador and the Secretary of State (*Diplomatic Correspondence, European War, Department of State*, No. 3, pp. 341 *et seq.*), show a definite ruling by our political department that the presence of the *Appam* in our waters did not violate neutrality. The treaty, as re-enacted in 1828, is undoubtedly still in force.

The municipal law of the United States is in accord with international law as declared by this court. 35 Stat. 1090, 1091; Fenwick, *Neutrality Laws of the United States*, c. 2, p. 26; 1 *Am. State Papers*, p. 140.

The neutrality proclamations of the United States are

in accord with its municipal law and with general international law. Having failed to interdict the entrance of prizes into our ports, permission to enter must be assumed. Our traditional policy, differing from that of Europe, but adhered to in this war and throughout our history, is not to forbid asylum for prizes. Montague Bernard's *Neutrality of Great Britain during the American Civil War* (London, 1870), pp. 133, 145 *et seq.*

It has consistently been held, that in the absence of express prohibition, prizes may enter and remain in neutral ports. 7 Ops. Atty. Gen. 122; Moore's *International Law Digest*, vol. 7, p. 982; Twiss, *Law of Nations*, 2d ed., vol. 2, pp. 453, 454; Hall, *International Law*, 5th ed., p. 618; Halleck, *International Law*, 1st ed., p. 523; Calvo, *Le Droit International Theorique et Pratique*, 3d ed. (1880), vol. 3, p. 498; *The Exchange*, 7 Cranch, 116.

The questions at issue are not affected by the provisions of the Hague Convention. The Hague Conventions do not necessarily declare existing law, they may change it. Scott's *Texts of Hague Peace Conferences, 1899-1907*, Intro., pp. ix, xix; Preamble to Convention XIII, Scott's *Hague Peace Conferences*, vol. 2, p. 507. Expressly, these rules are subject to existing treaties. They apply only if all belligerents are parties to the Convention. Article 28, *id.*, p. 519. Great Britain and Turkey have not ratified; Convention XIII therefore does not apply. *The Farn Case*, Mr. Lansing to British Ambassador, Diplomatic Correspondence, European War, Department of State, No. 2, p. 140. The convention may not be taken as evidence in the face of the consistent policy of this country maintained by all branches of its government and never reversed. Besides, the Convention, taken literally, does not deny permission to enter, and no penalty could fall, under Art. 21, until after notice, which has never been given.



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Mr. Frederic R. Coudert and Mr. James K. Symmers, with whom Mr. Howard Thayer Kingsbury, Mr. Herbert Barry, Mr. Floyd Hughes, Mr. Ralph James M. Bullock and Mr. Munroe Smith were on the briefs, for appellees:

Unless they are expressly excluded, prizes may seek temporary shelter in a neutral port, but not permanent or indefinite asylum. This rule is the product of a long course of historical development in the various maritime countries. French Ordinances of 1543, 1674 and 1689; French Prize Code of 1784. See Naval War College, International Law Situations, 1908, p. 54, and appendix to 5 Wheaton, 52-58. In 1650, and again in 1681, France prohibited the stay of foreign prizes in her ports for more than twenty-four hours. Pistoye & Duverdy, *Traité des Prises Maritimes*, vol. 2, pp. 449, 452. This is, perhaps, the origin of the twenty-four hour limitation for belligerent war vessels in neutral ports. Edict of the States General of Holland of November 7, 1658, in note to *The Josefa Segunda*, 5 Wheat. 349, citing Duponceau's Translation of Bynkershoek. The English authorities recognize the same general rule. *The Flad Oyen*, 1 C. Rob. 135; *The Henrick and Maria*, 4 C. Rob. 43; *The Polka*, Spinks, Ecclesiastical and Admiralty Reports, p. 447. The German Prize Code expressly recognizes it, Huberich & King, pp. 64, 65. There is a striking agreement of opinion among the leading text-writers. Wheaton's Treatise on Capture (1815), pp. 262, 263; Wheaton, International Law, 8th Am. ed., § 391, note; Hall, International Law, 5th ed., p. 618; Westlake, International Law, part 2, p. 215; Risley, The Law of War, p. 176; Dr. James Brown Scott, in American Journal of International Law, January, 1916, pp. 104-112; Bluntschli, International Law, § 778, note.

During our Civil War, our War with Spain, and in the Russo-Japanese War, neutral nations generally either excluded prizes or allowed only temporary entrance in cases

of necessity. Bernard's History of British Neutrality, pp. 137-141; Naval War College, International Law Situations, 1908, pp. 70-73; American Journal of International Law, January, 1916, pp. 109 *et seq.*

The provisions of Arts. 21 and 22 of Convention XIII of the Hague Conference of 1907 are declaratory of the existing law of nations. The express refusal of the United States to accede to Art. 23 was notice to the world that this country would not allow the sequestration of prizes in our ports. The policy of the United States, as well as that of Great Britain, is clearly shown by Arts. 21 and 22 which were signed, adhered to or ratified by forty-three of the powers. This is indicative of the very general agreement among the nations that these articles declared existing international law. The German Prize Code is equally convincing.

Article 23 is evidently inconsistent with Arts. 21 and 22 and contrary to the general rule of neutrality and the modern practice developed by the nations. The attitude of the United States in its reservation indicates its disavowal of the proposed innovation. In the proceedings of the Convention that article was decided upon as a compromise measure. While all agreed on 21 and 22 as expressing existing law, Art. 23 was debated as an innovation, and from the standpoint of policy. These debates disclose the fact that Great Britain and the United States stood for the codification of existing international law as finally embodied in 21 and 22; Germany also acquiesced, proposing to add to the original draft of Art. 21 the words: "for lack of provisions or fuel." This amendment was accepted. The German delegation evidently followed the view of their government as now embodied in their present Prize Code.

The adhesion of the United States to Arts. 21 and 22 was clearly no accidental compromise, but was done in pursuance of the fixed policy of this country and that

of other nations, as shown by their definitely proclaimed practice, at least since the middle of the nineteenth century. As pointed out in Oppenheim on International Law, vol. 2, pp. 395-397, only by adhering to this practice can neutrality be preserved.

After the termination of the Revolutionary War and as a consequence of our Treaties with France of 1778, numerous and protracted difficulties arose in regard to the bringing by French vessels into American ports of prizes. At that time it was permissible to give to one power or another certain privileges available in wartime. In discussing these treaties it must be remembered that the evolution of the law of neutrality, which has taken place since, especially as a consequence of these exclusive privileges given by the United States to France, wholly negatives this ancient view. The fundamental postulate of neutrality to-day is complete impartiality between the belligerents. This rule, embodied in the original statutes of the United States, and since so firmly adhered to, is not founded upon "bookish theoric" but is the resultant of painful national experience. McMaster's History of the People of the United States, vol. 2, pp. 103, 136; *Gray v. United States*, 21 Ct. Clms. 340, 360, 384; Moore on International Arbitrations, vol. 4, p. 3967.

The first act in the drama was Washington's proclamation of neutrality. The difficulty in maintaining it was largely due to the embarrassing position in which the United States was involved by having accorded to France exclusive treaty privileges, and especially the provision allowing such use of its ports as was necessarily incompatible with impartiality. *Id.*, pp. 3970-3977; *The Betsey*, 3 Dall. 6; *The Vrow Christina Magdalena*, Bee, 11, Fed. Cas. No. 7216. The case of *The Betsey*, not only overruled all the decisions of the lower courts refusing jurisdiction in this class of cases, but established at that early date (1794) the proposition that the courts of the United

States had power to enforce and vindicate international law. The French treaty clause was in vain invoked as excluding the jurisdiction of the court, precisely as the claimants here invoke the similar Prussian treaty clause.

The decision in the *Betsy Case* was followed on June 5, 1794, by the Neutrality Act, which, with some additions, has remained the law up to the present time. This act sought to meet the difficulties that had arisen out of the great European struggle and had for its object the declaration and codification of the policy followed by Washington and Jefferson and based by them upon the law of nations.

The construction placed by the executive upon the clauses allowing prizes to be taken into American ports, as set forth in Mr. Jefferson's letter to Gallatin, August 28, 1801, Moore's International Law Digest, vol. 7, § 1302, pp. 935, 936, and again by Mr. Pickering, Secretary of State, in 1796, *id.*, 936, make it apparent that under the interpretation placed upon the clause of the French treaty, similar to that of the Prussian treaty, now in question, little more was granted to the vessel and her prize than would now be allowed under the law as declared by Art. 21 of the Hague Convention XIII. It is idle to endeavor now to interpret the Prussian treaty by reference to the letters *inter sese* of the distinguished Americans who were engaged in the effort to persuade Prussia to make it.

War vessels with or without prizes might have been absolutely excluded from our ports; by treaties with some nations we allowed them temporary shelter. We refused to consider this temporary shelter as an asylum, and the treaties, even where applicable, were thus interpreted in a fashion not inconsistent with fair neutrality. Attorney General Wirt, 2 Ops. Atty. Gen. 86; Attorney General Cushing, 7 Ops. Atty. Gen. 212; Clay, Secretary of State, Moore's International Law Digest, vol. 7, p. 937;

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Mr. Seward to Peruvian Legation, *id.*, p. 938; Attorney General Cushing, 7 Ops. Atty. Gen. 122. For the so-called Bergen prizes, see Moore's International Law Digest, § 1314; Act of March 28, 1806, 6 Stat. 61. The prizes were brought into Bergen under stress of weather and for necessary repairs. No precedent was created except one against the right of asylum.

There are certain other early treaties which show that, where it was intended to give or secure any greater privileges than those clearly expressed in the Prussian treaty, appropriate language was used. Treaty with Algiers, 1798, Arts. IX, X; Treaty with Algiers, 1816, Art. XVIII; Treaty with The Netherlands, 1782, Art. V; Treaty with Sweden, 1783, Arts. XVIII, XIX. See summary of treaties in regard to prizes in neutral ports in Phillimore's International Law, vol. 3, § 380.

The courts of admiralty of a neutral country have jurisdiction of a suit by the owner of a prize which has been brought into a port of the neutral, and may award restitution when there has been a violation of neutrality on the part of the captor, whether inherent in the capture, or prior or subsequent thereto. *Palachi's Case*, 1 Rolle, 175, 3 Bulstrode, 27; *Lex Mercatoria* (London, 1729), p. 179; *Molloy's De Jure Maritimo*, vol. 1, pp. 14, 15, 58; *Laws of the Admiralty* (London, 1767), vol. 1, p. 219; *The Betsey*, 3 Dall. 6; *The Santissima Trinidad*, 1 Brock. 478, Fed. Cas. No. 2568; affirmed in 7 Wheat. 283; *The Exchange*, 7 Cranch, 116; *The Invincible*, 1 Wheat. 238; *The Divina Pastora*, 4 Wheat. 52; *The Estrella*, 4 Wheat. 298; *La Amistad de Rues*, 5 Wheat. 385; *The Arrogante Barcelones*, 7 Wheat. 496; and other cases. *Queen v. The Chesapeake*, 1 Oldright (Nova Scotia), 797; *La Reine des Anges*, Stewart's Admiralty Rep. (Nova Scotia), 11; *The Purissima Concepcion*, 6 Rob. 45; *The Vrow Anna Catharine*, 5 Rob. 15; *The Eliza Ann*, 1 Dods. 244; *The Diligentia*, 1 Dods. 404; *The Twee Gebroeders*,



3 Rob. 161; *The Anna*, 5 Rob. 373; *The Sir William Peel*, 5 Wall. 517; *The Florida*, 101 U. S. 37.

In the case at bar the violation of neutrality was subsequent to the act of capture and was a deliberate attempt to use an American port as a naval base for the safe-keeping of the prize during the war. The time of the violation of neutrality is immaterial; there has been a violation and the prize has been voluntarily brought within the jurisdiction of the American courts. The power and duty to make restitution follow as a matter of course.

The Prussian treaties of 1799 and 1828 do not apply. Examination of the French and English texts shows that these and the contemporary treaties with Sweden, France and England, apply only to prizes which are brought into port by vessels of war. They constitute exceptions and necessitate strict construction. They contemplate merely a temporary stay for some particular necessity and do not permit a neutral port of refuge to be made a port of ultimate destination or of indefinite asylum. Opinion of Secretary of State, March 2, 1916. The French text of the Prussian Treaty of 1799 is free from the ambiguity that appellants impute to the English. Appellants' historical review of the negotiations for the treaty actually militates against their own contentions. The convoy of a war vessel to protect its prizes was insisted upon as essential because, as the Prussian sovereign pointed out, some of his principal ports were not fortified, and he therefore could not protect a prize which came in for shelter without a war vessel to defend it against hostile attack.

The German ambassador expressly admitted in his memorandum for the State Department that the Prussian Treaty of 1799 "made it necessary that the prize was brought into port by the capturing vessel," and contended for a wider application in view of "the development of modern cruiser warfare."

Complete title to a prize, whether neutral or belliger-

ent, does not fully vest in the captor until the prize has been brought into one of the captor's ports and duly condemned by a competent prize court of the captor's country. Until then the prize may be lost by recapture, abandonment or violation of another nation's neutrality. Prior to such condemnation the captor has merely a right *ad rem* and no right *in re*; in other words, merely that limited right which possession gives until by condemnation *dominium* or plenary title is acquired. Amos, Roman Civil Law, pp. 157, 158. There is considerable diversity among the early authorities on this question. Grotius, Liber 3, c. 6, § 3, note 3; Bynkershoek's Treatise on the Law of War, Du Ponceau's Translation, c. 5, p. 41; Burlamaqui, Principles of Politic Law, Part 4, c. 7, §§ 15-18; Richard Lee, Treatise of Captures in War, pp. 82, 96; *Goss v. Withers*, 2 Burrow's Rep. 638; *Assiavedo v. Cambridge*, 10 Mod. 77; March's New Cases, p. 110; Wooddenson's Lectures, vol. 2, p. 274; *The Flad Oyen*, 1 C. Rob. 135.

The American rule requires that the captured vessel be brought within the jurisdiction of the captor's country in order to divest the title of the original owners, and that a sentence of condemnation be duly pronounced by a competent court. Attorney General Lee, 1 Ops. Atty. Gen. 78; *Stewart v. United States*, 1 Ct. Clms. 113, 119; *Manila Prize Cases*, 188 U. S. 254, 260, 278. See also *Miller v. The Resolution*, 2 Dall. 1; *The Nassau*, 4 Wall. 634, 641.

It seems clear from the language of *The Adventure*, 8 Cranch, 221, that, even assuming that the capture, of itself, divested their property, leaving only a *spes recuperandi*, all the rights of the British owners were revived the moment the *Appam* was brought by the prize-master into our neutral waters.

Leading French, German and English commentaries are in agreement that until condemnation the original owner's rights are never finally extinguished but merely

remain in abeyance. Bluntschli, *International Law Codified*, paragraphs 739, 740, 741, 860; Bonfils, *Manuel de Droit International Public* (Paris, 1914), paragraphs 1416, 1420; Wheaton, *International Law* (Phillipson, 1916), p. 581; Oppenheim, *International Law*, vol. 2, § 196; Upton, *Maritime Warfare and Prize* (1861); *Rev. Stats.*, § 4652; *Oakes v. United States*, 30 Ct. Clms. 378; *The Star*, 3 Wheat. 86; *The Beaver*, 3 C. Rob. 292; "The Emily St. Pierre" and "The Experience," Dana's notes to Wheaton, pp. 474, 475; U. S. Diplomatic Correspondence, 1862, pp. 75-148. See Pitt Cobbett, *Leading Cases on International Law* (1913), pp. 204, 205.

In any event, as held in the case of *The Santissima Trinidad*, 7 Wheat. 355, the pendency of prize proceedings in a foreign court cannot be set up against the jurisdiction of our courts to deal with a *res* actually in their custody. The case of *The Mary Ford*, 3 Dall. 188, is not a controlling authority. This decision was rendered in 1794, when the whole law of prize was in a very unsettled condition. The conclusion reached is entirely inconsistent with the later decision in the case of *The Adventure*, *supra*.

The *Appam* is not a German public vessel or entitled to the exemptions of a public vessel. An uncondemned prize stands in a category by herself. She may, after condemnation, be sold to a private purchaser and become a private vessel under new ownership, or she may be appropriated to public uses, pacific or belligerent. She may, in certain exceptional cases, be converted into a public vessel even before condemnation. But to effect this she must be regularly commissioned as such by some competent authority. She may then become entitled to the exemptions of a public vessel. *The Exchange*, 7 Cranch, 116. As to the case of *The Farn*, see Diplomatic Correspondence, European War, Department of State, No. 2, pp. 139, 140. *The Tuscaloosa* was restored expressly on the ground that she had been commissioned as a ship of

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war, and converted into a tender to the *Alabama*. Semmes, *Memoirs of Service Afloat*, pp. 739-743; Molloy, *Treaties, &c.*, 1776-1909, vol. 1, p. 721.

Nothing whatever has been done to take the *Appam* out of the category of prize, and convert her into a public vessel, or devote her to public use. She would not, as a German public vessel, bring several hundred prisoners to the United States for the purpose of setting them free. She could not bring them here to hold them as prisoners in our waters without manifestly violating our neutrality, as she in fact did in this respect, and the express prohibition of the American statutes. Rev. Stats., § 5286. The neutrality regulations applicable to the Panama Canal Zone, referred to by appellants, merely provide that in passing through the Canal prizes shall be subject to the same restrictions as war vessels. This does not constitute a recognition of prizes as public vessels. Moreover, such use of the Canal is necessarily temporary.

The sending of a prize to a neutral port with a prize crew insufficient to navigate her, and with intention to lay her up, is equivalent to an abandonment and thereby divests the captors' inchoate right. To hold a capture merely by putting on board a prize-master, with or without a small crew, the prize-master must actually bring the prize into a home port for condemnation. *The Alexander*, 8 Cranch, 169; *Wilcocks v. Union Ins. Co.*, 2 Binney, 574, 578; Attorney General Grundy, 3 Ops. Atty. Gen. 377.

Under the prize laws of the United States, the failure to bring proceedings with due diligence in a competent court for an adjudication of prize is in itself ground for the release of the vessel. Rev. Stats., § 2645.

In like manner, the German Prize Code provides for the bringing of proceedings for condemnation in due season. Here the *res* is in the custody of our court, and the pendency of proceedings in a German prize court is

mere *brutum fulmen*, under the decision in *The Santissima Trinidad*, 7 Wheat. 355.

Restitution to the owner is the appropriate and only adequate remedy. The inquiry to be made by our courts is whether the prize was brought in for permitted purposes, and, if so, whether she remains longer than her necessities require. If she acts otherwise, then she is, in the language of the Hague Convention, to be "released." If released, she must necessarily revert to her owners, since the temporary adverse possession of the captors is thus removed. This, however, was no new invention of the Hague Conference. Its roots go back at least to the Edict of the States General of Holland of 1658, already cited, which expressly provided that, in such event:

"The prize should be restored to the former owners as though it had never been taken." Consolato del Mare, Benedict's Admiralty, § 119. See Diplomatic Correspondence, European War, Department of State, No. 2, p. 141. If internment were the only remedy, the captor's chief purpose, of securing a place of safe-keeping for his spoils, would be accomplished. Moreover, the German Government has expressly disclaimed and objected to internment in this case.

That restitution is made by court decree rather than by executive action is the result of the historic development of our judicial and diplomatic precedents. The remedies are concurrent; but for many years it has been the policy of this government to leave such questions to the courts rather than to dispose of them summarily by executive action. (See Chief Justice Marshall's opinion, in the Circuit Court in *The Santissima Trinidad*, *supra*.)

MR. JUSTICE DAY delivered the opinion of the court.

These are appeals from the District Court of the United States for the Eastern District of Virginia, in two ad-



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miralty cases. No. 650 was brought by the British & African Steam Navigation Company, Limited, owner of the British steamship, *Appam*, to recover possession of that vessel. No. 722 was a suit by the master of the *Appam* to recover possession of the cargo. In each of the cases the decree was in favor of the libellant.

The facts are not in dispute and from them it appears: That during the existence of the present war between Great Britain and Germany, on the fifteenth day of January, 1916, the steamship *Appam* was captured on the high seas by the German cruiser, *Moeve*. The *Appam* was a ship under the British flag, registered as an English vessel, and is a modern cargo and passenger steamship of 7800 tons burden. At the time of her capture she was returning from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernels, tin, maize, sixteen boxes of specie, and some other articles. At the West African port she took on 170 passengers, eight of whom were military prisoners of the English Government. She had a crew of 160 or thereabouts, and carried a three-pound gun at the stern. The *Appam* was brought to by a shot across her bows from the *Moeve*, when about a hundred yards away, and was boarded without resistance by an armed crew from the *Moeve*. This crew brought with them two bombs, one of which was slung over the bow and the other over the stern of the *Appam*. An officer from the *Moeve* said to the captain of the *Appam* that he was sorry he had to take his ship, asked him how many passengers he had, what cargo, whether he had any specie, and how much coal. When the shot was fired across the bows of the *Appam*, the captain instructed the wireless operator not to touch the wireless instrument, and his officers not to let any one touch the gun on board. The officers and crew of the *Appam*, with the exception of the engine-room force, thirty-five in number, and the second officer, were ordered

on board the *Moewe*. The captain, officers and crew of the *Appam* were sent below, where they were held until the evening of the seventeenth of January, when they and about 150 others, officers and crews of certain vessels previously sunk by the *Moewe*, were ordered back to the *Appam* and kept there as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the *Appam* he was now a member of the German navy; if he did not obey orders his brains would be blown out, but if he obeyed, not a hair of his head should be touched. The *Appam's* officer was instructed to tell his staff the same thing, and if they did not obey orders they would be brought to the German officer and shot. Inquiries were made by the German officer in command of the *Appam* as to revolutions of the engines, the quantity of coal on hand and the coal consumption for different speeds, and instructions were given that steam be kept up handy, and afterwards the engineer was directed to set the engines at the revolutions required, and the ship got under way.

Lieutenant Berg, who was the German officer in command of the *Appam* after its capture, told the engineer on the second morning that he was then in charge of the ship, asked of him information as to fuel consumption, and said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who were relieved from time to time, but did not interfere with the working of the ship. The German officer, Lieutenant Berg, gave directions as to working the engines, and was the only officer on board who wore a uniform.

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On the night of the capture, the specie in the specie-room was taken on board the *Moeve*. After Lieutenant Berg took charge of the *Appam*, bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosive, was placed on the bridge, and several smaller ones in the chart room. Lieutenant Berg informed the captain of the *Appam*, pointing to one of the bombs, "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have orders to blow up the ship instantly." He also said, "There are other bombs about the ship; I do not want to use them, but I shall be compelled to if there is any trouble." The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed. Lieutenant Berg, on reaching Hampton Roads, asked the crew of the *Appam* to drop the anchor, as he had not men to do it.

During the trip to the westward, the officers and crew of the *Appam* were not allowed to see the ship's compass to ascertain her course, and all lights were obscured during the voyage. The German prisoners, with the exception of two who went on board the *Moeve*, were armed and placed over the passengers and crew of the *Appam* as a guard all the way across. For two days after the capture, the *Appam* remained in the vicinity of the *Moeve*, and then was started westward. Her course for the first two or three days was southwesterly, and afterwards westerly, and was continued until her arrival at the Virginia Capes on the thirty-first of January. The engine-room staff of the *Appam* was on duty operating the vessel across to the United States; the deck crew of the *Appam* kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German prisoners.

At the time of the capture, the *Appam* was approximately distant 1,590 miles from Emden, the nearest German port; from the nearest available port, namely,

Punchello, in the *Madeiras*, 130 miles; from Liverpool, 1,450 miles; and from Hampton Roads, 3,051 miles. The *Appam* was found to be in first class order, sea-worthy, with plenty of provisions, both when captured and at the time of her arrival in Hampton Roads.

The order or commission delivered to Lieutenant Berg by the commander of the *Moewe* is as follows:

"Information for the American Authorities. The bearer of this, Lieutenant of the Naval Reserve Berg, is appointed by me to the command of the captured English steamer 'Appam,' and has orders to bring this ship into the nearest American harbor, and there to lay up. Kommando S. M. H. Moewe. Count Zu Dohna, *Cruiser Captain and Commander*. (Imperial Navy Stamp:) Kommando S. M. H. Moewe."

Upon arrival in Hampton Roads, Lieutenant Berg reported his arrival to the Collector, and filed a copy of his instructions to bring the *Appam* into the nearest American port and there to lay up.

On February 2d, His Excellency, the German Ambassador, informed the State Department of the intention, under alleged treaty rights, to stay in an American port until further notice, and requested that the crew of the *Appam* be detained in the United States for the remainder of the war.

The prisoners brought in by the *Appam* were released by order of the American Government.

On February 16th, and sixteen days after the arrival of the *Appam* in Hampton Roads, the owner of the *Appam* filed the libel in case No. 650, to which answer was filed on March 3d. On March 7th, by leave of court, an amended libel was filed, by which the libellant sought to recover the *Appam* upon the claim that holding and detaining the vessel in American waters was in violation of the law of nations and the laws of the United States and of the neutrality of the United States. The answer of the

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respondents to the amended libel alleged that the *Appam* was brought in as a prize by a prize master, in reliance upon the Treaty of 1799 between the United States and Prussia; that by the general principles of international law the prize master was entitled to bring his ship into the neutral port under these circumstances, and that the length of stay was not a matter for judicial determination; and that proceedings had been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the *Appam* as a prize of war; and averred that the American court had no jurisdiction.

The libel against the *Appam's* cargo was filed on March 13th, 1916, and answer filed on March 31st. During the progress of the case, libellant moved the court to sell a part of the cargo as perishable; on motion the court appointed surveyors, who examined the cargo and reported that the parts so designated as perishable should be sold; upon their report orders of sale were entered, under which such perishable parts were sold, and the proceeds of that sale, amounting to over \$600,000, are now in the registry of the court, and the unsold portions of the cargo are now in the custody of the marshal of the Eastern District of Virginia.

The argument in this case has taken wide range, and orally and in printed briefs counsel have discussed many questions which we do not consider necessary to decide in determining the rights involved in these appeals.

From the facts which we have stated, we think the decisive questions resolve themselves into three: First, was the use of an American port, under the circumstances shown, a breach of this Nation's neutrality under the principles of international law? Second, was such use of an American port justified by the existing treaties between the German Government and our own? Third, was there jurisdiction and right to condemn the *Appam* and her cargo in a court of admiralty of the United States?



It is familiar international law that the usual course after the capture of the *Appam* would have been to take her into a German port, where a prize court of that Nation might have adjudicated her status, and, if it so determined, condemned the vessel as a prize of war. Instead of that, the vessel was neither taken to a German port, nor to the nearest port accessible of a neutral power, but was ordered to, and did, proceed over a distance of more than three thousand miles, with a view to laying up the captured ship in an American port.

It was not the purpose to bring the vessel here within the privileges universally recognized in international law, i. e., for necessary fuel or provisions, or because of stress of weather or necessity of repairs, and to leave as soon as the cause of such entry was satisfied or removed. The purpose for which the *Appam* was brought to Hampton Roads, and the character of the ship, are emphasized in the order which we have quoted to take her to an American port and there lay her up and in a note from His Excellency, The German Ambassador, to the Secretary of State, in which the right was claimed to keep the vessel in an American port until further notice, (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, Department of State, European War No. 3, p. 331,) and a further communication from the German Ambassador forwarding a memorandum of a telegram from the German Government concerning the *Appam* (*Idem*, p. 333), in which it was stated:

"*Appam* is not an auxiliary cruiser but a prize. Therefore she must be dealt with according to Article 19 of Prusso-American treaty of 1799. Article 21 of Hague Convention concerning neutrality at sea is not applicable, as this convention was not ratified by England and is therefore not binding in present war according to Article 28. The above-mentioned Article 19 authorizes a prize ship to remain in American ports as long as she

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pleases. Neither the ship nor the prize crew can therefore be interned nor can there be question of turning the prize over to English."

In view of these facts, and this attitude of the Imperial Government of Germany, it is manifest that the *Appam* was not brought here in any other character than as a prize, captured at sea by a cruiser of the German navy, and that the right to keep her here, as shown in the attitude of the German Government and in the answer to the libel, was rested principally upon the Prussian-American Treaty of 1799.

The principles of international law recognized by this Government, leaving the treaty aside, will not permit the ports of the United States to be thus used by belligerents. If such use were permitted, it would constitute of the ports of a neutral country harbors of safety into which prizes, captured by one of the belligerents, might be safely brought and indefinitely kept.

From the beginning of its history this country has been careful to maintain a neutral position between warring governments, and not to allow the use of its ports in violation of the obligations of neutrality; nor to permit such use beyond the necessities arising from the perils of the seas or the necessities of such vessels as to sea-worthiness, provisions and supplies. Such usage has the sanction of international law, Dana's Note to Wheaton on International Law, 1866, 8th American Edition, § 391, and accords with our own practice. Moore's Digest of International Law, vol. 7, 936, 937, 938.

A policy of neutrality between warring nations has been maintained from 1793 to this time. In that year President Washington firmly denied the use of our ports to the French Minister for the fitting out of privateers to destroy English commerce. This attitude led to the enactment of the Neutrality Act of 1794, afterwards embodied in the Act of 1818, enacting a code of neutrality,

which among other things inhibited the fitting out and arming of vessels; the augmenting or increasing of the force of armed vessels; or the setting on foot in our territory of military expeditions; and empowering the President to order foreign vessels of war to depart from our ports and compelling them so to do when required by the law of nations. Moore on International Arbitrations, vol. 4, 3967 *et seq.*

This policy of the American Government was emphasized in its attitude at the Hague Conference of 1907. Article 21 of the Hague Treaty provides:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

Article 22 provides:

"A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

To these articles, adherence was given by Belgium, France, Austria-Hungary, Germany, the United States, and a number of other nations. They were not ratified by the British Government. This Government refused to adhere to Article 23, which provides:

"A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

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"If the prize is not under convoy, the prize crew are left at liberty."

And in the proclamation of the convention the President recited the resolution of the Senate adhering to it, subject to the "reservation and exclusion of its Article 23 and with the understanding that the last clause of Article 3 of the said Convention implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction." 36 Stat., Pt. II, p. 2438.

While this treaty may not be of binding obligation, owing to lack of ratification, it is very persuasive as showing the attitude of the American Government when the question is one of international law; from which it appears clearly that prizes could only be brought into our ports upon general principles recognized in international law, on account of unseaworthiness, stress of weather, or want of fuel or provisions, and we refused to recognize the principle that prizes might enter our ports and roadsteads, whether under convoy or not, to be sequestered pending the decision of a prize court. From the history of the conference it appears that the reason for the attitude of the American delegates in refusing to accept Article 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to conduct to a home port. See Scott on Peace Conferences, 1899-1907, vol. II, p. 237 *et seq.*

Much stress is laid upon the failure of this Government to proclaim that its ports were not open to the reception of captured prizes, and it is argued that having failed to interdict the entrance of prizes into our ports permission to thus enter must be assumed. But whatever privilege might arise from this circumstance it would not warrant the attempted use of one of our ports as a place in which to store prizes indefinitely, and certainly not where no

means of taking them out are shown except by the augmentation of her crew, which would be a clear violation of established rules of neutrality.

As to the contention on behalf of the appellants that Article XIX of the Treaty of 1799 justifies bringing in and keeping the *Appam* in an American port, in the situation which we have outlined, it appears that in response to a note from His Excellency, The German Ambassador, making that contention, the American Secretary of State, considering the treaty, announced a different conclusion (Diplomatic Correspondence with Belligerent Governments, *supra*, p. 335 *et seq.*); and we think this view is justified by a consideration of the terms of the treaty. Article XIX of the Treaty of 1799, using the translation adopted by the American State Department, reads as follows.

"The vessels of war, public and private, of both parties, shall carry (*conduire*) freely, wheresoever they please, the vessels and effects taken (*pris*) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (*prises*) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (*conduites*) out again at any time by their captors (*le vaisseau preneur*) to the places expressed in their commissions, which the commanding officer of such vessel (*le dit vaisseau*) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (*vaisseau*) that shall have made a prize (*prise*) upon British subjects shall have a right to shelter in the ports of the United States, but if (*il est*) forced therein by tempests, or any other danger or accident of the sea, they (*il sera*) shall be obliged to depart as soon as possible." (The provision concerning the treaties between the United States and Great Britain is no longer



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in force, having been omitted by the Treaty of 1828. See *Compilation of Treaties in Force*, 1904, pp. 641 and 646.)

We think an analysis of this article makes manifest that the permission granted is to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process, when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show. When the *Appam* came into the American harbor she was not in charge of a vessel of war of the German Empire. She was a merchant vessel, captured on the high seas and sent into the American port with the intention of being kept there indefinitely, and without any means of leaving that port for another as contemplated in the treaty, and required to be shown in the commission of the vessel bringing in the prize. Certainly such use of a neutral port is very far from that contemplated by a treaty which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government. We cannot avoid the conclusion that in thus making use of an American port there was a clear breach of the neutral rights of this Government, as recognized under principles of international law governing the obligations of neutrals, and that such use of one of our ports was in no wise sanctioned by the Treaty of 1799.

It remains to inquire whether there was jurisdiction and authority in an admiralty court of the United States, under these circumstances, to order restoration to an individual owner of the vessel and cargo.

The earliest authority upon this subject in the decisions of this court is found in the case of *Glass v. The Sloop Betsey*, 3 Dall. 6, decided in 1794, wherein it appeared that the commander of the French privateer, *The Citizen*

*Genet*, captured as a prize on the high seas the sloop *Betsy* and sent the vessel into Baltimore, where the owners of the sloop and cargo filed a libel in the District Court of Maryland, claiming restitution because the vessel belonged to subjects of the King of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The District Court denied jurisdiction, the Circuit Court affirmed the decree, and an appeal was prosecuted to this court. The unanimous opinion was announced by Mr. Chief Justice Jay, holding that the District Courts of the United States possessed the powers of courts of admiralty, whether sitting as an instance or as a prize court, and sustained the jurisdiction of the District Court of Maryland, and held that that court was competent to inquire into and decide whether restitution should be made to the complainants conformably to the laws of nations and the treaties and laws of the United States.

The question came again before this court in the case of *The Santissima Trinidad*, decided in 1822, reported in 7 Wheat. 283. In that case it was held that an illegal capture would be invested with the character of a tort, and that the original owners were entitled to restitution when the property was brought within our jurisdiction. The opinion was delivered by Mr. Justice Story, and, after a full discussion of the matter, the court held that such an illegal capture, if brought into the jurisdiction of the courts of the United States, was subject to condemnation and restitution to the owners, and the learned justice said:

"If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction, could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured,

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the question can never be litigated. It can arise only upon a claim of the neutral sovereign, asserted in his own courts, or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required, before cognizance of the wrong could be taken by our courts. But the practice from the beginning, in this class of causes, a period of nearly thirty years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy." (p. 349.)

" . . . Whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws." (p. 354.)

In the subsequent cases in this court this doctrine has not been departed from. *L'Invincible*, 1 Wheat. 238, 258; *The Estrella*, 4 Wheat. 298, 308-311; *La Amistad de Rues*, 5 Wheat. 385, 390.

It is insisted that these cases involve illegal captures at sea, or violations of neutral obligation, not arising because of the use of a port by sending in a captured vessel and keeping her there in violation of our rights as a neutral. But we are at a loss to see any difference in principle between such cases and breaches of neutrality of the

character here involved in undertaking to make of an American port a depository of captured vessels with a view to keeping them there indefinitely. Nor can we consent to the insistence of counsel for appellant that the Prize Court of the German Empire has exclusive jurisdiction to determine the fate of the *Appam* as lawful prize. The vessel was in an American port and under our practice within the jurisdiction and possession of the District Court which had assumed to determine the alleged violation of neutral rights, with power to dispose of the vessel accordingly. The foreign tribunal under such circumstances could not oust the jurisdiction of the local court and thereby defeat its judgment. *The Santissima Trinidad*, *supra*, p. 355.

Were the rule otherwise than this court has frequently declared it to be, our ports might be filled in case of a general war such as is now in progress between the European countries, with captured prizes of one or the other of the belligerents, in utter violation of the principles of neutral obligation which have controlled this country from the beginning.

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It follows that the decree in each case must be

*Affirmed.*